



Towards the creation a fair ride-hailing industry: Should South African labour law regulate the Uber relationship?

Ms Sabieha Chayya (CHYSAB001)

Supervisor: Ms Sufinnah Singlee

Word Count: 26 980 (including footnotes)

Research dissertation/ research paper presented for the approval of Senate in fulfilment of part of the requirements for the degree of Masters of Law, in the Department of Labour Law, Faculty of Law, in approved courses and a minor dissertation/ research paper. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Law, in the Department of Labour Law, Faculty of Law, dissertations/ research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.

Signed: *Sabieha Chayya*

Dated: 18 February 2018

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

ACKNOWLEDGMENTS

Embarking on this journey has been phenomenal and I could not have done it without the grace of the Almighty, I am extremely grateful to the Almighty for granting me the opportunity of completing this journey through the University of Cape Town. To my supervisor Ms Suffinah Singlee I am thankful for your continuous support and encouragement, your feedback and advice has been immensely beneficial, your knowledge in this field is remarkable and I have benefited greatly from it. I am extremely grateful to the postgraduate funding office for granting me the KW Johnston scholarship in order to complete this pertinent goal. To my family thank you for continuously supporting me in every journey that I embark, I am especially grateful to my mum and dad for constantly motivating me and to my brother for all the support. The UCT staff have been extremely accommodating and never refused to advise and assist and for that I am grateful. Doing my masters has changed me positively in my growth as an individual and without all your support and motivation this journey would not have been possible.

List of Acronyms

BCEA	Basic Conditions of Employment Act
CCMA	Commission for Conciliation, Mediation and Arbitration
CC	Constitutional Court
COGP	Code of Good Practice
EAT	Employment Appeal Tribunal
ECJ	European Court of Justice
EEA	Employment Equity Act
EER	Employment Relationship Recommendation
ERA	Employment Rights Act
ET	Employment Tribunal
EU	European Union
ILO	International Labour Organisation
IWGB	Independent Workers Union of Great Britain
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
NEDLAC	National Economic Development and Labour Council
NEHAWU	National Education, Health and Allied Workers Union
NMWA	National Minimum Wage Act
NUMSA	National Union of Metal Workers of South Africa
NUPSAW	National Union of Public Service and Allied Workers
SANDU	South African National Defence Unit
SATAWU	South African Transport and Allied Workers Union
TES	Temporary Employment Service
Uber BV	Uber Netherlands

Uber SA	Uber South Africa
UK	United Kingdom
UIA	Unemployment Insurance Act
ULL	Uber London Limited
OHSA	Occupational Health and Safety Act
WTRA	Working Time Regulations Act

TABLE OF CONTENTS

CHAPTER 1: A BRIEF INTRODUCTION TO THE GIG-ECONOMY AND UBER.....1

1.1 Introduction:.....	1
1.2 Problem statement and structure of the dissertation	2
1.3 The changing world of work.....	3
1.4 What is the gig economy?	6
1.5 The UBER platform and Uberization	8
1.6 Conclusion	10

CHAPTER 2: THE RELEVANT LEGAL & NORMATIVE FRAMEWORK.11

2.1 The 1996 Constitution.....	11
2.3 The International Labour Organisation (ILO) and relevant instruments:	12
2.4 ILO Declaration of Philadelphia	13
2.5 Employment Relationship Recommendation, 2006 (No. 198)	14
2.6 Section 23 of the Constitution: The right to fair labour practices.....	15
2.7 The Labour Relations Act, 66 of 1995.....	18
2.8 The Employment Equity Act	20
2.9 The Basic Conditions of Employment Act	20
2.10 Unemployment Insurance Act (UIA).....	21
2.11 Occupational Health and Safety Act (OHSA)	21
2.12 Defining the term ‘employee’ for the purposes of the LRA	22
2.13 Temporary Employment Services (TES).....	27
2.14 Common Law.....	30
2.15 CCMA 2017 AWARD RECOGNISING UBER DRIVERS AS EMPLOYEES	30
2.16 The Labour Court.....	33
2.17 Conclusion	35

CHAPTER 3: UK employment law, policy recommendations and relevant case law.....36

3.1 Introduction.....	36
3.2 Employment status in the United Kingdom.....	36
3.3 The judicial tests used to determine employment status in the United Kingdom	40
3.4 Recent developments in the UK in respect of the gig-economy, with a specific focus on the Uber arrangement.....	43
3.5 Recent case law developments in the UK.....	49
3.6 Conclusion	54

CHAPTER 4: The Difficulties in classification and the extent to which protections that should be provided to Uber drivers.....56

4.1 Difficulties in classification	56
4.2 A third category?.....	60
4.3 Should Uber drivers be legally recognised as ‘employees’ of Uber for the purposes of South African labour legislation?	63
4.4 Specific protections in terms of South African labour law	64
4.4.1 Individual and collective labour rights.....	64

4.4.2 Statutory minimum terms and conditions of employment	65
4.4.3 Equal treatment.....	67
4.4.4 Health and safety	67
4.4.5 Unemployment benefits.....	69
4.6 Conclusion	70
 CHAPTER 5: Conclusion.....	71
5.1 The Gig- economy and Uber.....	71
5.2 The Normative Framework.....	71
5.3 Employment Law, Policy Recommendations and Case law in the UK	72
5.4 The Difficulties in classification and the extent to which protections that should be provided to Uber drivers	72
5.6 The way forward?	73
 BIBLIOGRAPHY	74

CHAPTER 1: A BRIEF INTRODUCTION TO THE GIG-ECONOMY AND UBER

1.1 Introduction:

In 2013, Uber was introduced in South Africa. The Uber platform is an example of the so called ‘gig-economy.’ Work conducted on the gig economy is a shift away from the typical method of employment which is becoming an arcane feature in the new world of work. Processes such as globalisation (which is the growth of interaction of people, states, countries which involves goods and services, capital, technology and data),¹ deregulation and technological advances seem to appear on the forefront of these changes.² The standard employment relationship has transformed by industrialisation and political development within each country.³ It has been expressed that due to technological advancements and globalisation the standard employment relationship is in a decline and that this decline is unlikely to be reduced.⁴ One of the distinguishing factors between standard and non-standard employment is that standard employment guarantees an income and ‘insurance against labour market risks’.⁵ The change away from non- standard employment is also as a result of responses to developments in law, for example, in South Africa there are laws that permit the practice of triangular employment.⁶ Work life balance is another contributing factor owing to more persons working in non- standard employment.⁷

It has been argued that current labour legislation was drafted with the intention to protect a certain category of employees, that is, employees in traditional full time employment.⁸ Whilst trying to reduce costs and trying to keep up with the ‘demands’ of globalization, employers are moving away from the boundaries of traditional employment. However this is usually to the detriment of workers as businesses often engage in non-standard employment to avoid labour law regulations.⁹ The so called

¹ ‘Globalization’ <https://en.wikipedia.org/wiki/Globalization>, accessed on 11 February 2018.

² Paul Benjamin ‘An Accident of History: (Who is and Who should be) an Employee under South African labour Law’ (2004) ILJ, p 789.

³ Zoe Adams and Simon Deakin ‘Institutional Solutions to Precariousness and Inequality in Labour Markets’ Centre for Business Research, University of Cambridge WP463 (2014), p 5.

⁴ Ibid, p 8.

⁵ Ibid, p 9.

⁶ Ibid, p 18.

⁷ Ibid, p 24-25.

⁸ ES Fourie ‘Non-Standard Workers: The South African Context, International Law And Regulation By The European Union’ PER/PELJ 2008 (11)4, p 110.

⁹ Ibid, p 112.

‘flexibility’ granted to a worker may, therefore, prove to be a way for employers to disguise employment, and depriving workers of important labour rights and benefits.¹⁰ There is much risk presented by these new forms of work, especially for workers. This dissertation will focus specifically on work offered in the gig-economy to examine the extent of precariousness associated with this industry.

1.2 Problem statement and structure of the dissertation

As it currently stands, the Uber relationship is unregulated in South Africa and this may lead to a precarious situation. Uber drivers may find themselves in particularly vulnerable situations due to the fact that there is a great degree of control exercised over them and at times placing them in a relationship of subordination (as will be elaborated on later). Further these workers are without labour law rights and social security rights. Given the uncertainty around the gig economy and the various relationships that are formed via these platforms, it is therefore necessary to understand the different relationships and to consider the extent to which these relationships should be regulated by South African labour law. The question raised in this dissertation is, therefore, whether South African labour law should regulate the Uber relationship. The advantages and disadvantages of regulating the Uber relationship will be discussed. The dissertation will also include brief policy recommendations.

In terms of the structure of this dissertation, the first chapter will provide a brief introduction to the gig-economy and specifically the Uber platform. The Uber platform is a move away from the traditional employment relationship and as such the distinction between standard and non-standard employment will be discussed and how this has contributed to the ‘changing world of work’. Thereafter, the nature of the Uber platform will be analysed.

In Chapter two, the legal normative framework will be discussed. As, South Africa is a member state of the ILO and has ratified certain ILO conventions, the ILO’s fundamental principles will be discussed as well as how South Africa promotes these standards. The primary sources of law such as the Constitution of the Republic of

¹⁰ Employers also disguise employment as so called ‘self-employment-’Paul Benjamin ‘*An Accident of History: (Who is and Who should be) an Employee under South African labour Law*’ (2004) ILJ, p 789.

South Africa (the Constitution),¹¹ the Labour Relations Act (LRA),¹² the Basic Conditions of Employment Act, (BCEA)¹³ the Employment Equity Act (EEA),¹⁴ the Unemployment Insurance Act (UIA),¹⁵ and the Occupational Health and Safety Act (OHSA)¹⁶ will be examined with reference to Uber drivers. Externalisation in the form of a temporary employment service will also be mentioned with regards to the relationships formed by the Uber platform. Further the common law tests used by the judiciary to distinguish between an independent contractor and an employee will be elaborated on.

Chapter three will be a comparison chapter. The UK's legal framework with regards to the 'worker' category will be explained as well as recent policy recommendations made by the UK with regards to the gig economy and how these recommendations can be applied to Uber drivers.

In Chapter four, the advantages and disadvantages of regulating the Uber relationship will be analysed and finally the extent to which labour law should protect Uber drivers in proportion to the relationships so formed on the Uber platform will be deliberated.

Finally chapter five will conclude by drawing together the recommendations put forward in the above chapters.

The methodology of this dissertation is a non-empirical dissertation. It will involve the inclusion of primary and secondary sources of law.

1.3 The changing world of work

One of the most crucial aspects of an employment contract is the guarantee of employment status and social protections that come with employment status.¹⁷ Diversity in the workplace has contributed to non-standard employment and less social protection as compared to standard employment.¹⁸

¹¹ Constitution of the Republic of South Africa, 1996.

¹² Labour Relations Act 66 of 1995.

¹³ Basic Conditions of Employment Act 75 of 1997.

¹⁴ Employment Equity Act 55 of 1998.

¹⁵ Unemployment Insurance Act 63, 2001.

¹⁶ Occupational Health and Safety Act 85 of 1993.

¹⁷ Supio *'Transformation of labour and future of labour law in Europe'* final report (1998), p 5.

¹⁸ Ibid.

Standard employment is the conventional form of employment (also known as ‘typical employment’), which is usually work performed on a full time basis and the employee has one employer, usually a single workplace and the work is subject to the control of the employer.¹⁹ Working conditions are regulated.²⁰ This means that such an employee is entitled to labour law rights prescribed in legislations such as the LRA, BCEA, EEA and social security rights laws.

As discussed above non- standard employment is on the rise and as a result the dividing line between an employer and an independent contractor seems unclear. Workers in non- standard forms of employment are particularly vulnerable as they do not have the same protection afforded to them by labour law in the form of certain individual rights; collective bargaining rights; social security rights; and they have less- favourable terms as those employees in conventional forms of employment.²¹ The circumstances of employment also make the enforcement of their rights difficult.²² These workers are usually bound by their ‘sham’ contracts which do not grant them any protections as it is presumed that they are independent contractors whilst, in actuality, this may not be the case. If these workers are in a position of subordination and dependency they are particularly more vulnerable as they are without employment rights.²³

Non- standard employment consists of two processes, namely casualisation and externalisation:²⁴

Casualisation is a process of change in the workforce as a result of an increased use of part time and temporary workers.²⁵ Workers generally have one employer, work

¹⁹ Rochelle le Roux ‘*World of work: forms of enlargement in South Africa*’ (2009) Monograph Series, p 12.

²⁰ Ibid. Also see Jan Theron ‘*Employment is not what it used to be*’ (2003) 24 ILJ 1247 – in this article it is stated that Standard employment possesses characteristics such as full time employment (employee has one employer); the employee works on the premises of the employer; there is usually a contract of employment (ongoing), p 1249.

²¹ Paul Benjamin ‘*An Accident of History: (Who is and Who should be) an Employee under South African labour Law*’ (2004) ILJ, p 790.

²² Ibid.

²³ Guy Davidov ‘*The Status of Uber Drivers: A Purposive Approach*’ (2017) - the author of this article refers to vulnerabilities as subordination and dependency.

²⁴ Rochelle le Roux ‘*World of work: forms of enlargement in South Africa*’ (2009) Monograph Series, p 14.

²⁵ Jan Theron ‘*Employment is not what it used to be*’ (2003) 24 ILJ 1247. See therons discussion on the analogy of casualization with the “doctrine of flexibility” under the discussion of section 1 of his article.

on the employer's premises and have a contract of employment.²⁶ A distinguishing factor from standard employment is that these workers either do not work full time or if they do work full time they do so on a fixed term contract.²⁷ Their employment is constructed in a manner that deprives them of their basic statutory rights as employees.²⁸ The pool of these workers comprises of casual workers (who work less than 24 hours per month), part time workers, temporary workers working on a fixed term and seasonal workers. These employees albeit not working in terms of conventional employment are still employees and are still afforded certain rights such as unfair dismissal rights in terms of the LRA, however exercising these rights becomes difficult for these employees due to the unitary nature of their contracts and the unitary regulation of the casualised relationship.²⁹ Casualisation is also seen as a means whereby companies maximise the number of temporary and part time workers and minimise the number of persons in standard employment.³⁰

Externalisation is the provision of services and goods in terms of a commercial contract instead of an employment relationship.³¹ Two main categories are identified. Firstly where goods and services are provided to a core business via an intermediary, the terms and conditions of their employment are wholly determined by the terms of the commercial contract between the intermediary and the core business.³² Secondly where the substitution of the contract of employment between the employer and the employee with a commercial contract attempts to convert the legal status of the employee to that of an independent contractor.³³ Whereas casualisation, outlined above 'merely dilutes the standard employment relationship, externalisation camouflages the employment relationship'.³⁴ Externalisation has given rise to a number of issues which the courts and legislature have been called upon to deal with,

²⁶ Ibid.

²⁷ Rochelle le Roux 'World of work: forms of enlargement in South Africa' (2009) Monograph Series, p 14.

²⁸ Labour Relations Act 66 of 1995.

²⁹ Rochelle le Roux 'World of work: forms of enlargement in South Africa' (2009) Monograph Series. Le Roux suggests that the contract cannot be blamed and that it is clear that these workers are employees- (which will be discussed in chapter 2).

³⁰ Jan Theron 'Non-standard employment and labour legislation: The outlines of a strategy,' (2014) Monograph, p 7.

³¹ Rochelle le Roux 'World of work: forms of enlargement in South Africa' (2009) Monograph Series, p 17.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

one such being the Temporary Employment Service (TES) arrangement. Chapter 2 deals further with the discussion of a TES.

Statistics South Africa, furthermore, indicates that access to labour and social security rights is a problem occurring in South Africa's informal sector as well. In this regard, the study records that during the period July to September 2017, there were 14069 persons working in the formal(11379) and informal(2689) sector(excludes agricultural work), which included persons working in the mining, manufacturing, utilities, construction, trade, transport, finance, community and social services and others.³⁵ According to the conditions of payment- 7048 of these persons were not receiving pension/retirement fund contributions.³⁶ Statistics showed that 4444 were not entitled to any paid leave, further, 4031 were not entitled to paid sick leave³⁷ and 5819 were not entitled to maternity /paternity leave. In addition 5426 were not entitled to UIF contribution,³⁸ 9592 were not receiving medical aid benefits and 5996 not receiving income tax (PAYE).³⁹ With regards to trade union membership 9560 did not have trade union membership.⁴⁰ As can be seen from these statistics, there are various labour and social rights not enjoyed by many workers in the formal and the informal sector.⁴¹

1.4 What is the gig economy?

The gig- economy is defined as a temporary position where organisations contract with independent contractors for short term engagements,⁴² and instead of getting paid regular wages, persons get paid for the 'gigs' they do.⁴³ According to a report published by Balaram et al, the gig economy is the trend of using online platforms to find small jobs sometimes completed immediately after request (essentially, on-demand).⁴⁴ In the context of the Uber model each ride that an Uber driver accepts is a 'gig' or a single job.⁴⁵

³⁵ Statistics South Africa '*Quarterly Labour Force Survey*', Quarter 3 (2017).

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² <http://whatis.techtarget.com/definition/gig-economy>, accessed 11 February 2018.

⁴³ <http://www.bbc.com/news/business-38930048>, accessed 11 February 2018.

⁴⁴ Brhmie Balaram, Josie Warden and Fabian Wallace-Stephens 'Good Gigs- A fairer future for the UK's gig economy' (2017) at, p 10.

⁴⁵ Ibid.

The gig economy is categorised into two forms of work, that is, ‘crowd work’ and ‘work on demand’- performed via apps.⁴⁶ Crowd work involves completing a series of tasks via online platforms.⁴⁷ This allows individuals to connect on a global basis.⁴⁸ ‘Work on demand’ is where traditional working activities are channelled through applications managed by firms that set minimum quality standards of service.⁴⁹ Crowd work can be performed anywhere in the world however ‘work on demand’ is carried out locally.⁵⁰

It has been noted that there are many similarities between the two categories which could justify employing the same legal and regulatory responses, there are however distinct differences.⁵¹ Crowd work involves an indefinite amount of organisations, businesses and individuals.⁵² Work on demand is traditional and clerical work through a mobile application.⁵³ In work on demand the work is on a local basis.⁵⁴ The method of payment between crowdwork and work on demand can also differ, for instance on the crowdwork platform there may be competitions whereby the client only pays for the best product.⁵⁵ In some instances, in the crowd work platform the worker merely performs the task and is paid by the platform who delivers the result to the client.⁵⁶ There are also different types of work on demand, for instance some applications match supply and demand of various activities such as cleaning, house repairs, and some might merely be offering one service such as providing rides.⁵⁷ These differences may result in certain consequences such as the acceptance and execution of contracts which can affect applicable legislation.⁵⁸ Some similarities between the two are that they are both enabled via the use of the internet, which allows for minimising transaction costs, workers are provided “just-in time”.⁵⁹

⁴⁶ Valerio De Stefano ‘The Rise of the “Just-In-Time Workforce”: On-Demand Work, Crowd Work and Labour Protection in the “Gig Economy” Comparative Law and Policy Journal, Forthcoming Bocconi Legal Studies Research Paper No. 2682602 (2015), p 2.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid, (the Good Gigs report also provides a similar description at p 10).

⁵¹ Ibid, p 3.

⁵² Ibid, p 4.

⁵³ Ibid, p 5.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid, p 6.

Notably, as this dissertation seeks to discuss whether or not South Africa should regulate the Uber relationship, the focus will, henceforth be on the Uber model as a form of “work on demand”.

1.5 The UBER platform and Uberization

Uberization is the transition of an economical model based on digital technologies which enable direct exchanges between service providers and customers subject to a transactional cost.⁶⁰ The very word is derived from the Uber platform and as such Uber is a typical example of Uberization. Uberization usually exhibits three characteristics; a prevalence of contractual and temporary employment, a digital platform (such as an application) and a rating system for the evaluation of the quality of service received.⁶¹ It includes a set of procedures such as geo-location, online payments, a workforce management and distribution in an app.⁶² Ride hailing companies claim to be technological firms that merely provide a platform for the independent self-employer called “Uberpreneurs”.⁶³ The following is a common advertisement made public by Uber:

‘Drive with Uber and earn great money as an independent contractor. Get paid weekly just for helping our community of riders get rides around town. Be your own boss and get paid in fares for driving on your own schedule.’⁶⁴

Uber is a company that is based in the Netherlands⁶⁵ and operates an application that is downloaded via a smartphone.⁶⁶ Uber operates in 70 countries and

⁶⁰ Roxana Radu, Stephanie Borg Psaila ‘*Uberisation Demystified: Examining Legal and Regulatory Responses Worldwide*’ (2017), p3.

⁶¹ Ibid.

⁶² A. Aloisi ‘*Commoditized Workers: Case Study Research on Labor Law Issues Arising from A Set of ‘On-Demand/Gig Economy’ Platforms*’ 37 Comp. Lab. L. & Pol’y J. 653, 670 (2016), p 670.

⁶³ Mimi ZOU ‘*The Regulatory Challenges of ‘Uberization’ in China: Classifying Ride Hailing Drivers*’ International Journal of Comparative Labour Law and Industrial Relations 33, no 2 (2017): 269-294. The author discusses ‘uberization’ in China and how platforms such as Uber claim to be appointing independent contractors where as these drivers indeed form an integral part of the so called ‘technological’ platform-the measure of control these companies have over the drivers is also discussed, in certain cases in China the courts held that these drivers provide the services to customers on behalf of the companies and in this manner attempt to implement the principle of vicarious liability (at p 291).

⁶⁴ ‘Uber’ <https://get.uber.com/p/legacy-cl-base/>, accessed 11 February 2018.

⁶⁵ *Uber South Africa Technology Services Pty (Ltd) v NUPSAW & Others* (C449/17) [2018] ZALCCT 1, at para 1.

⁶⁶ Ibid.

approximately 500 cities around the world.⁶⁷ More than 5 million trips take place a day via the Uber application.⁶⁸ In 2014, Uber added more than 30 000 drivers to its network.⁶⁹ Individuals who require transportation services log onto the application, request a ride and are paired via the app with an available driver.⁷⁰ Once the user has requested a ride, the user is able to phone the driver and the driver is also allowed to phone the user.⁷¹ Once the trip ends this function also ends.⁷² The name of the driver, photo and licence plate number are made available to the user.⁷³ Uber makes it clear that it appoints drivers as independent contractors and not as employees and further, states that drivers have the freedom and flexibility to drive when they want to, where to go and who to pick up.⁷⁴

Uber allows persons to drive for the company after a few requirements have been met, which includes passing a background and Department of Motor Vehicles check, owning a vehicle and having car insurance. Further drivers must adhere to a certain amount of rides.⁷⁵

Customers often prefer using Uber than calling a cab as it is quicker and allows the user to track where the driver is and how long the driver will take to arrive.⁷⁶ Instead of making use of supervisors Uber has a rating system.⁷⁷ Once the ride comes to an end, the passenger is given an option to rate the driver.⁷⁸ In Cape Town, an average rating of 4 needs to be maintained and if the rating falls below this and does not improve, drivers may be deactivated.⁷⁹

Uber has three types of drivers:⁸⁰

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Kgomoetso Mokoena 'Are Uber drivers employees? A look at the emerging business models and whether they can be accommodated by South African Labour Law' (2016) 37 ILJ, p1575.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid, p1574. This article discusses the Uber platform specifically with regards to SA framework, an analysis of the application of the Uber app in SA is provided.

⁷⁴ Uber(terms and conditions).

⁷⁵ Richard A Bales; Christian Patrick Woo 'The Uber Dollar Question: Are Uber Drivers Employees or Contractors', 68 Mercer L. Rev. 461, 488 (2017), p 465.

⁷⁶ Miriam A. Cherry 'Beyond Misclassification: The Digital Transformation of Work' (2016), p 4.

⁷⁷ Ibid, p 21. If the rating falls below a certain average the driver can no longer sign into the app.

⁷⁸ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU and Others* (2017) In Limine Ruling (CCMA), at para 19.

⁷⁹ Ibid.

⁸⁰ Ibid, at para 11.

1. Partner only: the partner owns one or more vehicles but does not drive. The partner is, responsible for paying the driver, and the partner receives its payment from Uber less fee deducted which fee is retained by Uber.
2. Partner driver: the partner driver is a vehicle provider who also drives the vehicle. As a partner the partner driver may also appoint another driver that is approved by Uber to drive.
3. Driver only: the driver only does not does not drive his/her vehicle but drives a vehicle provided by a partner.

The relationships formed on the Uber platform are complicated unitary relationships. From the above it can be seen that the 'partner only' has a relationship with the 'driver' and the partner together with the driver also has a relationship with Uber. The 'partner driver' who drives the vehicle has a relationship with Uber but the 'partner driver' also has a relationship with other drivers that may be appointed and as such that driver also has a relationship with Uber. The 'driver only' has a direct relationship with the 'partner' whose car is being driven and also with Uber. The various relationships formed result in externalisation and the above mentioned parties fall beyond the scope of labour law protections by virtue of their independent contractor status. In Chapter 2 the above relationships will be elaborated on and in Chapter 4 the extent to which labour law protections should be afforded to these categories of workers will be examined.

1.6 Conclusion

As evidenced from the above discussion, the gig economy comprises of various models and has contributed to the escalation of non-standard employment. The Uber platform is one such example of the gig economy. It will be argued that certain categories of Uber drivers should be entitled to labour law protections and that certain categories of drivers are a reflection of externalisation.

Before delving into the discussion of whether labour laws should be granted to Uber drivers it is necessary to determine the legal normative framework as it currently stands. In the next chapter I will discuss the above principles with regards to our labour law jurisprudence with specific reference to Uber drivers.

CHAPTER 2: THE RELEVANT LEGAL & NORMATIVE FRAMEWORK

The distinction between independent contractors and employees has reiteratively been raised by the South African courts. The entering into of contracts between companies and workers as independent contractors seems to be more prevalent in today's evolving world of work.⁸¹ The manner in which these workers conduct work often equates to that of an employment relationship. Workers who are less likely to have formal working arrangements are therefore likely to lack decent working conditions, adequate social security and representation through trade unions and other such similar organisations.⁸² Uber drivers may indeed fall within the category of vulnerable workers entitled to the protection of our laws and more specifically labour laws. This chapter will discuss the relevant legal framework as it pertains to the scope and ambit of labour law. The labour law framework is broad and it will therefore not be possible to discuss this in its entirety. The discussion below pertains to the relevant provisions of the Constitution, international law, legislation, case law and current legal developments.

2.1 The 1996 Constitution

The new constitutional dispensation emulated the principles of the interim constitution (which brought about constitutional supremacy and the end of parliamentary supremacy) and declared South Africa to be a sovereign and democratic state founded on values such as human dignity.⁸³ Section 2 of the Constitution includes a supremacy clause declaring any conduct or law that is in conflict with the provisions of the Constitution to be invalid and declaring the Constitution to be the supreme law of the country. The supremacy clause ensures that South Africa remains a constitutional democracy in that the framework of the constitutional provisions must be adhered to.⁸⁴ The constitution is further binding on all branches of state and is supreme to any rules or conduct by the government, legislatures and the courts.⁸⁵

⁸¹ See discussion in chapter one on casualization and externalization.

⁸² 'International Labour Organization' http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_120470/lang--en/index.htm, accessed 11 February 2018.

⁸³ Constitution of the Republic of South Africa, 1996, s1.

⁸⁴ Currie I & De Waal J 'The Bill of Rights Handbook,' 6ed (2013) Juta, Cape Town, chap 1, pg.9.

⁸⁵ Ibid.

Chapter 2 of the Constitution includes a Bill of Rights which is a cornerstone of democracy in South Africa.⁸⁶ In terms of section 8 of the Constitution the Bill of Rights binds legislature, the executive, judiciary and all organs of state,⁸⁷ as well as natural and juristic persons.⁸⁸ The rights in the Bill of Rights are for the benefit of everyone within South Africa⁸⁹ and are not only meant to protect individuals against the state.⁹⁰ Section 39 of the Constitution echoes the above principles by ensuring that courts and tribunals must promote the values of a democratic society based on human dignity, equality and freedom⁹¹ and that the spirit, purport and object of the Bill of Rights must be promoted.⁹² Section 39(1) of the Constitution stipulates that International law must be considered when interpreting the Bill of Rights. The following discussion will examine the role of International law with specific regard to the International Labour Organisation (ILO), as well as the significance and importance of certain ILO instruments to the discussion at hand. Thereafter, section 23 of the Constitution, that is the right to fair labour practices' will be examined.

2.3 The International Labour Organisation (ILO) and relevant instruments:

The ILO is a special agency of the United Nations and aims at promoting rights at work, encouraging decent employment opportunities, enhancing social protection and strengthening dialogue on work related issues.⁹³ The ILO aims at bringing together governments, employers and workers representatives to set labour standards, develop policies and to promote decent work programmes for all women and men.⁹⁴ South Africa is a member state of the ILO. The ILO has a number of conventions and recommendations. The ILO conventions if ratified become binding on member states.⁹⁵ The ILO recommendations are not binding but are of importance as they supplement conventions by providing guidelines on how conventions can be applied,

⁸⁶ Constitution of the Republic of South Africa, 1996, s7.

⁸⁷ Ibid s8 (1).

⁸⁸ Ibid s8 (2).

⁸⁹ Currie I & De Waal J '*The Bill of Rights Handbook*,' 6ed (2013) Juta, Cape Town, chap 3, pg. 34.

⁹⁰ Ibid, chap 3, pg. 41. S 8(1) and s 8(2) of the Constitution.

⁹¹ Constitution of the Republic of South Africa, 1996, s39 (1) (a).

⁹² Ibid s 39 (2).

⁹³ 'About the ILO' <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm>, accessed 11 February 2018.

⁹⁴ 'Mission and Impact of the ILO' <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm>, accessed 11 February 2018.

⁹⁵ 'Conventions and Recommendations' <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>, accessed 11 February 2018.

they can also serve to be independent.⁹⁶ Upon ratification, application of the convention through national law must be implemented by the member state and reporting must be done at regular intervals to the ILO.⁹⁷

Section 23 of the Constitution guarantee's everyone the right to fair labour practices. In terms of s 39 of the Constitution, it is stated that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law. Section 1 of the Labour Relations Act (LRA)⁹⁸ states that the purpose of the Act is to give effect to the obligations incurred by South Africa being a member of the ILO. In the case of *S v Makwanyane and Another*⁹⁹ the court referred to International law and noted that public international law includes binding and nonbinding law. The court noted that International agreements provide a framework within which the Bill of Rights can be evaluated and understood and that reports of specialized agencies such as the ILO may provide guidance to the correct interpretation of particular provisions of the Bill of Rights.¹⁰⁰ In the case of *South African National Defence Unit v Minister of Defence (SANDU)*,¹⁰¹ the court stressed the importance of the ILO conventions and recommendations when interpreting and considering the scope of the term "worker" in terms of s 23 of the Constitution and acknowledged that s 39 of the Constitution provides that the courts must consider International law.¹⁰²

2.4 ILO Declaration of Philadelphia

The ILO Declaration of Philadelphia contains the aims and purposes of the ILO, and as a result of the end of the world war it aspired to take into consideration new realities. The declaration of Philadelphia is annexed to the Constitution of the ILO.¹⁰³ The ILO enunciates that labour is not a commodity and acknowledges that labour is not an "inanimate," product that can be negotiated to the highest bidder.¹⁰⁴

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Labour Relations Act 66 of 1995.

⁹⁹ [1995] ZACC 3.

¹⁰⁰ Ibid at para 413-414.

¹⁰¹ [1999] ZACC 7.

¹⁰² Ibid at para 25.

¹⁰³ ILO Declaration of Philadelphia '*Declaration concerning the aims and purposes of the International Labour Organisation.*'

¹⁰⁴ 'The benefits of International Labour Standards' <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang--en/index.htm>, accessed 11 February 2018.

The ILO reiterates that one's work is crucial to one's dignity.¹⁰⁵ Uber labels itself as a technological company, however the workers behind this so called "technological" platform perform "real" work. Platforms such as Uber allege that they match the demand and supply of services provided to customers and do not interfere in the activities offered through their platforms and as such are justified in labelling themselves as a mere technological company.¹⁰⁶ The fact that Uber uses technology to effect its services does not condone the fact that the manner in which Uber represents itself may indeed be a sham as was emphasised by the United States District court where it was said that the fact that Uber and other such similar companies use digital tools to match demand and supply of rides cannot mean that they should be regarded as a technological company solely on this ground.¹⁰⁷ Furthermore Uber drivers are only paid for work that they do, they may at times due to circumstances beyond their control not be able to work (for example when they are sick) and are at risk of being with no income at all and this further results in the instability of work and income. This according to Valerio, entails 'a strong commodification' of work and hence no value is given to the 'personal nature of labour'.¹⁰⁸ From the above we can see that labour being viewed as a commodity is not something new and the Uber platform may very well be capitulating to this concept. Valerio suggests that what could be included in the ILO is that 'labour is not a technology'.¹⁰⁹ The LRA implements the principal that 'labour is not a commodity' by giving effect to the constitutional right to fair labour practices and the right to be treated with dignity. The following in sections will examine the relevant provisions of the LRA which give effect to this principal.

2.5 Employment Relationship Recommendation, 2006 (No. 198)

Over the past few decades, changes in the world of work have been at the forefront of discussions at the ILO. One such change has been the emergence of contractual relationships that have the effect of depriving workers of labour protections (so-called 'disguised employment'). In direct response to these concerns,

¹⁰⁵ Ibid.

¹⁰⁶ Valerio de Stefano 'Labour is not a technology-Reasserting the Declaration of Philadelphia in times of Platform Work and Gig-Economy' *IUSLabor* 2/2017, pg.3.

¹⁰⁷ United States District Court, Northern District of California, O'Connor et al. v. Uber Technologies.

¹⁰⁸ Valerio de Stefano 'Labour is not a technology-Reasserting the Declaration of Philadelphia in times of Platform Work and Gig-Economy' *IUSLabor* 2/2017, pg.10.

¹⁰⁹ Ibid, p 14.

the ILO adopted the ERR in an attempt to provide guidance to member states to ensure that consistency in the application of international labour standards. In this regard, the ERR states that laws and regulations should comply with and give effect to the central objective of decent work¹¹⁰ by addressing the unequal bargaining positions between parties to an employment relationship. In meeting this goal, the ILO recommends that in their national policy, member states should ensure the protection of workers who are affected by the uncertainty as to the existence of an employment relationship with due regard to the importance of preserving and respecting ‘true civil and commercial relationships’ where this exist. Therefore, in addressing disguised employment, the ERR recommends that an enquiry into the existence of an employment relationship should be determined by the true facts of the case specifically those relating to the manner in which the worker performs his or her work and the manner in which they are remunerated, notwithstanding the labels the labels attached to the relationship between the parties.¹¹¹ Furthermore, Article 11 of the ERR states that policies should recommend a broad range of means for determining an employment relationship and or a presumption that such relationship exists if one or more of the relevant factors are present. In terms of our legislation s 200A of the LRA & s 83A of the BCEA seems to fulfil this obligation in that it does create a rebuttable presumption of an employment relationship once the listed factors are triggered.

2.6 Section 23 of the Constitution: The right to fair labour practices

In terms of s 23 of the Constitution ‘everyone has the right to fair labour practices.’ Specific reference is made to the word “everyone” and not “employee” as stipulated in legislation such as the LRA, the Employment Equity Act¹¹² (EEA) and the Basic Conditions of Employees Act¹¹³ (BCEA).

Currie and de Waal argue that Parliament’s intention is that the word ‘everyone’ as employed by s 23 of the Constitution extends beyond the confines of the traditional, common law employment relationship and, on this basis, the courts

¹¹⁰ In terms of the ILO decent work means meeting the expectations of people in their working lives, granting these persons opportunities for productive and fair work and income, implementing better social security as well as integration and development, respecting these persons concerns and promoting opportunity and equality for all(<http://www.ilo.org/global/topics/decent-work/lang--en/index.htm>).

¹¹¹ Employment Relationship Recommendation, 2006 (No.198), art 9.

¹¹² Employment Equity Act 55 of 1998.

¹¹³ Basic Conditions of Employment Act 75 of 1997.

through the interpretation and application of this constitutional right could afford labour law protections to a wider category of persons.¹¹⁴

According to Cheadle, not everyone who works is a ‘worker’ for the purposes of s 23 of the Constitution.¹¹⁵ Instead he suggests that those workers who should be protected by the Constitution should be those who are in a working relationship.¹¹⁶ The actual nature of the relationship is looked at to determine if there is a relationship of dependence. Cheadle suggests looking at three criteria:¹¹⁷

- Does the person provide a personal service?
- Does the person provide the service under a contract of employment? If the person does, that person is a worker for the purposes of s23.
- If a person providing a personal service is not subject to a contract of service, does that person provide the services as part of his/her business? If he or she does not perform the service as part of his/her business, that person performs work “akin to employment” and, accordingly, should fall within the protective ambit of s23.

In *SANDU* the court interpreted worker in terms of 23 of the Constitution to be read in the context of employers and employment and seemingly the provisions would apply to those who have entered into a contract of employment.¹¹⁸

If one applies the aforementioned criteria to the category of Uber workers it is evident that a personal service is being provided. Uber drivers work according to a contract of work and not a contract of service.¹¹⁹ The third leg of the above-mentioned test will therefore need to be applied in assessing whether Uber drivers perform work “akin to employment”.

Section 23 of the Constitution grants every worker the right to form and join a trade union, to participate in activities and programmes of trade unions and the right to strike. Cheadle states that ‘there is no prohibition on the existence of an unregistered trade union- they are entitled to exist, they are simply denied some of the rights

¹¹⁴ Iain Currie & Johan de Waal ‘*The Bill of Rights Handbook*,’ p 474-475.

¹¹⁵ H Cheadle & Dennis Davis *South African Constitutional Law: The Bill of Rights* (2005) LexisNexis South Africa, ch 18.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ [1999] ZACC 7, para 22.

¹¹⁹ See discussion in chap 1.

afforded to registered trade unions - such as representation rights before the CCMA , organisational rights and membership of bargaining councils'.¹²⁰

Section 23 of the Constitution complements the Constitutional right to dignity. The link between ones work and dignity was acknowledged in the Constitutional Court case of *Affordable Medicines Trust and Others v Minister of Health of RSA and Another*,¹²¹ where the court viewed work as 'constitutive' of one's dignity and it is a relationship that 'shapes and completes' that individual.¹²²

O'Regan J held that the right to dignity is the 'foundation of many other rights in the Bill of Rights.'¹²³

In the case of *Kylie v CCMA (Kylie)* ¹²⁴ it was stated that even if a person is not employed under a contract, interpretations should be consistent with the purposes and spirit of our Constitutional values.¹²⁵ This would entail a purposive approach which is aimed at upholding the values spirit and purport of the Bill of Rights and preferring such an interpretation.

The definition of fairness in light of s 23 of the Constitution can be confounding and therefore its definition in terms of the courts application is paramount. In the case of *NEHAWU v UCT (NEHAWU)*,¹²⁶ the court noted that the right to fairness is 'incapable of precise definitions'.¹²⁷ Given that the facts of each case will be peculiar and taking into account both the employers and workers right to fair labour practices the LAC in *NEHAWU* held that what is fair will depend on the circumstances of each case and this will involve a value judgment.¹²⁸ This right to fair labour practices goes together with the rights to freedom of association and equality. The right to fair labour practices may very well apply to Uber drivers. If Uber drivers are able to show that they are in a working relationship (and if they fit the criteria as mentioned above relationship test) and that such relationship is indeed one of dependence then fairness would demand that the courts strip away the facade and recognise this class of workers

¹²⁰ H Cheadle & Dennis Davis *South African Constitutional Law: The Bill of Rights* (2005) LexisNexis South Africa, ch 18 p 16.

¹²¹ (2005) BCLR 529 (CC).

¹²² Ibid at para 59.

¹²³ Iain Currie & Johan de Waal '*The Bill of Rights Handbook*,' pg. 252.

¹²⁴ [2010] 7 BLLR 705 (LAC).

¹²⁵ Ibid at para 21.

¹²⁶ [2002] ZACC 27.

¹²⁷ Ibid at para 33H-I.

¹²⁸ Ibid.

as employees for the purposes of s23 of the Constitution or, at the very least, workers who should be afforded a degree of labour protection.

Even though these rights are given constitutional protection, it was stressed in *SANDU v Minister of Defence*¹²⁹ that if legislation is enacted to give effect to a Constitutional right, persons may not rely directly on the Constitution without having first exhausted their rights in terms of legislation and only where the existing legislation falls short of the ‘constitutional standard’.¹³⁰ As stated by Du Toit, the constitution provides a ‘floor of rights’ and not a ‘ceiling of rights.’¹³¹ Certain rights are however only afforded to employees. The next sections will elaborate on how workers such as Uber drivers may very well be entitled to these labour law protections.

2.7 The Labour Relations Act, 66 of 1995

The purpose of the LRA is to give effect to s23 of the Constitution.¹³² The LRA should be the starting point of reference for persons alleging an unfair labour practice. Notably, only persons who meet the legal definition of ‘employee’ are entitled to rights under the LRA. In this regard, s 213 of the LRA provides the following:

‘employee means:

- a) any person, excluding an independent contractor , who works for another person or for the State and who receives , or is entitled to receive , any remuneration; and
- b) any other person who in any manner assists in carrying on or conducting the business of an employer,

and ‘employed’ and ‘employment’ have meanings corresponding to that of ‘employee.’’

Independent contractors (who enter into commercial contracts and who work independently with the aim of a completed result and upon such result the working relationship is terminated) are expressly excluded from the definition of ‘employee’ and therefore from the scope and ambit of the LRA.

¹²⁹ 2007 (5) SA 400 (CC); (2007) 28 ILJ 1909 (CC).

¹³⁰ Ibid, at para 51.

¹³¹ Du Toit et al *The Labour Relations Law: A Comprehensive Guide* 6-ed, (2015), LexisNexis, South Africa, p105.

¹³² Labour Relations Act 1995, s 1.

As discussed above the differentiation between an employee and an independent contractor is no easy determination. An independent contractor is specifically excluded from the definition of an employee as provided for in the LRA and as such is left outside the ambit and protections afforded by the LRA. However, at times ‘independent contractors’ should be protected from sham contracts and should be afforded the rights and protections in terms of the LRA. The legislature acknowledged the predicament that independent contractors are faced with. In this regard s200A of the LRA was introduced to create a ‘rebuttable presumption’ as to who is an employee.¹³³ However the mere fact that one of the listed factors is triggered does not establish that the person alleging to be an employee is indeed an employee. The onus will then rest on the employer to prove otherwise.¹³⁴ In terms of this presumption, “a person is presumed to be an employee, regardless of the form of the contract, if any one or more of the following seven factors are present:

- (a) The manner in which the person works is subject to the control or direction of another person.
- (b) The person’s hours are subject to the control/direction of another person.
- (c) In the case of a person working for an organisation, the person forms part of that organisation.
- (d) If a person has worked for that person for an average of at least 40 hours per month over the last three months.
- (e) The person is economically dependent on the person whom his/she works for.
- (f) The person is provided with the tools or trade of equipment required for conducting the specific work.
- (g) The person only works for or renders services to one person.”¹³⁵

Section 200A of the LRA complies with the ERR’s recommendation of applying a presumption of employment if one or more of the listed factors are established.¹³⁶ Furthermore, it is specifically provided in the Code of Good Practice (COGP) that the

¹³³ If a person who works or render services to a person/entity/organisation is able to establish any one of the listed factors in terms of s200A of the LRA, then there is a rebuttable presumption that such person is an employee of that person/entity/organisation (employer).

¹³⁴ Code of Good Practice: ‘Who is an Employee,’ Part 2.

¹³⁵ Labour Relations Act, 1995, s 200A.

¹³⁶ ERR, article 11.

presumption as stipulated in s200A of the LRA will apply regardless of the label given to the specific contract and that the actual relationship of employment between the parties must be looked at.¹³⁷ South African courts, the CCMA and legislature have a continuous duty in ensuring that the above mentioned recommendations are upheld and are bound to apply the above principles.

The following section examines the scope and ambit of specific labour laws as they are only available to employees but may potentially apply to Uber drivers.

2.8 The Employment Equity Act

The EEA's description of an employee is the same of that as the LRA.¹³⁸ The purpose of this Act is to give effect to s 9 of the Constitution-the right to equality.¹³⁹ Section 9 of the EEA states that applicants are also included in the definition of employee for the purposes of this Act. One of the core functions of the EEA is to eliminate workplace discrimination and to promote equality. It is clear that legislature intended a wide interpretation and application of the provisions of this Act by including applicants in the definition of employee. Uber drivers will only be able to be afforded the protections of this Act if they are able to show that they fall within the legal definition of 'employee'.

2.9 The Basic Conditions of Employment Act

The definition of employee in the BCEA is synonymous with the LRA and the EEA.¹⁴⁰ The purpose of the BCEA is to give effect to the right to fair labour practices through the advancement of economic development and social justice and by the establishment and enforcement of basic conditions of employment as well as giving effect to the ILO obligations.¹⁴¹ In terms of s4 of the BCEA a basic condition of employment is part of any contract of employment unless other law provides a more favourable term or if the contract of employment is more favourable to the employee. An agreement stating that a worker is an independent contractor and not an employee, when such worker is indeed an employee, such worker should also then fall within the

¹³⁷ COGP, item 16.

¹³⁸ Employment Equity Act 55 of 1998, s 1.

¹³⁹ Ibid, s 2.

¹⁴⁰ Basic Conditions of Employment Act 75 of 1997. s1.

¹⁴¹ Ibid, s2.

scope of the BCEA.¹⁴² Section 83A of the BCEA resembles the rebuttable presumption as stipulated in s 200A of the LRA, and as such if any of the listed factors are triggered the rights guaranteed in terms of the BCEA will be applicable. Uber drivers are once again faced with the barrier of their non-employee status when it comes to the provisions of the BCEA.

2.10 Unemployment Insurance Act (UIA)

The UIA¹⁴³ applies to all ‘employees’¹⁴⁴ but excludes any independent contractor”.¹⁴⁵ The benefits accrued under UIA are essential to workers who are unemployed or who are unable to work due to illnesses, require maternity, adoption and dependent benefits.

From the provisions of this Act only employees are able to benefit. Workers who work according to contracts of work are left without any assistance or income during the time that they are unable to work and no provision is made for this class of workers unless they are categorised as employees. This most certainly poses a risk to Uber drivers being left with no income at all due to circumstances beyond their control.

2.11 Occupational Health and Safety Act (OHSA)

This OHSA¹⁴⁶ places a duty on employers to provide a safe working environment for employees. Independent contractors are at times the most vulnerable of persons with regards to their safety at work and certain social security rights should most certainly be made available to them. The OHSA defines the term ‘employee’ to include “any person who is employed by or works for an employer and who receives or is entitled to receive any remuneration or who works under the direction or supervision of any employer or any other person”.¹⁴⁷ This provision is however subject to s 1 (2) of the Act which states that the Minister may by notice declare that a person belonging to a category of persons specified in the notice shall for the purposes of this Act or any other provision be deemed to be an employee, and by

¹⁴² Paul Benjamin ‘An Accident of History: (Who is and Who should be) an Employee under South African labour Law’ (2004) ILJ, p 798.

¹⁴³ Unemployment Insurance Act 63, 2001.

¹⁴⁴ Ibid, s 3.

¹⁴⁵ Ibid, s 1.

¹⁴⁶ Occupational Health and Safety Act 85 of 1993.

¹⁴⁷ Ibid, s1 (1).

person exercising control and supervision of the said person shall for the said purposes be deemed to be the employer of such person. The meaning of employee in this Act is very different from the other labour laws in that it does not specifically exclude independent contractors, it provides a very broad scope for both the definition of employee and employer as it may be deemed that a person exercising control and supervision over another can be defined as an employer of such person. It will be argued in the further chapters that certain social security rights should be afforded to Uber drivers regardless of their employment status.

2.12 Defining the term ‘employee’ for the purposes of the LRA

Section 213 of the LRA is expressive that only employees are entitled to labour law rights in terms of the LRA. However as discussed above, s200A of the LRA creates a rebuttable presumption if any of the listed factors are triggered. It is however the duty of our courts to interpret these provisions in a manner that best reflects our constitutional values. Below I will discuss the judiciary’s interpretation and application of the statutory definition of “employee.” It will also be shown how the courts have interpreted the constitutional right to fair labour practices by going beyond that of the common law provisions and by pushing the boundaries of legislation by granting protection to illegal workers, and even irregular migrants.

The complexity of determining the “true nature of a work relationship,” is not a new struggle faced by South Africa.¹⁴⁸ In *Colonial Mutual Life Assurance Society Ltd v MacDonald*¹⁴⁹(*Colonial*)the court had to deal with vicarious liability and the control test (which assesses the degree of control an employer has over the worker) was established. The court drew a distinction between a contract of service and a contract of work. The control test set the foundation on which employment relationships were determined for 50 years following the *Colonial* judgment.¹⁵⁰ In 1979 in the case of *Smit v Workman Compensation Commissioner*¹⁵¹(*Smit*) the control

¹⁴⁸ Rochelle le Roux ‘*The Evolution of the Contract of Employment in South Africa*’ (2010) ILJ – in this article le Roux discusses the common law position of the employment contract as far as the early 1930’s are concerned, she further discusses the reasoning behind the courts well known decision of *Mc Donald* and *Mckenzie* and how the control tests were viewed and applied to common law employment contracts and also the birth of the dominant impression test.

¹⁴⁹ 1931 AD 412.

¹⁵⁰ Rochelle le Roux ‘*The Evolution of the Contract of Employment in South Africa*’ (2010) ILJ, p 11.

¹⁵¹ 1979 (1) SA 51 (A).

test was brought to an end and the then Appellate Division applied a “dominant impression” test. In this regard, the following was stated :

"The greater the degree of supervision and control to be exercised by the employer over the employee the stronger the probability will be that it is a contract of service. On the other hand, the greater the degree of independence from such supervision and control the stronger the probability will be that it is a contract of work."¹⁵²

Following the *Smit* decision our courts to date have been applying the dominant impression test, which is a combination of the control test, organizational test, reality test as well as the incorporation of the factors listed in s200A of the LRA.

*Denel (Pty) Ltd v Gerber*¹⁵³

In this case, Gerber, the respondent received remuneration through a separate company of which she was a director and a member. Gerber did this with the intention to evade tax payments. The appellant terminated Gerber’s position and Gerber claimed unfair dismissal. The appellant argued that Gerber was not an independent contractor and not an employee as she was remunerated through her own company.¹⁵⁴ The LAC stated that that the specific ‘label’ given to a relationship might not in essence reflect the true nature of the realities of the relationship and that when determining whether one is an employee or not the “true and real” position must not be decided solely on what is stipulated in the agreement.¹⁵⁵ The court held that the reality of the relationship must be looked at on the basis of substance and not form.¹⁵⁶ The court concluded that Gerber was an employee of the appellant. Hence, the court looked beyond the fact that Denel was remunerated via a company for tax benefits and concluded that this did not mean that she should be excluded from the protections of the labour laws by being identified as an independent contractor when the true nature of her working relationship was that of an employee.

¹⁵² 1979 (1) SA 51 (A), at 62E.

¹⁵³ [2005] 9 BLLR 849 (LAC).

¹⁵⁴ Ibid at para 1.

¹⁵⁵ Ibid at para 22.

¹⁵⁶ Ibid.

*Discovery Health Ltd v Commission for Conciliation, Mediation & Arbitration & others*¹⁵⁷

In this case, the respondent was a foreign national without a work permit, the LC had to determine whether such a person could be recognised as an employee entitled to the LRA protections.¹⁵⁸ The applicant alleged that due to the foreign national not having a valid working permit his contract of employment was “tainted” with illegality and as such he was not an employee for the purposes of the LRA.¹⁵⁹ The court looked towards the Constitutional protections in terms of s23 and stipulated that this provision is not dependent on a contract of employment.¹⁶⁰ The court adopted a purposive interpretation of s213 of the LRA and held that the interpretation must be read together with s200A of the LRA and s83A of the BCEA especially when one is dealing with “disguised employment.”¹⁶¹

*Universal Church of The Kingdom of God v Myeni & Others*¹⁶²

Mr Myeni, the respondent in this case, was a priest. The appellant argued that Myeni was not an employee of the church. Myeni signed a document stating that he was rendering a voluntary service. The LAC held that since Mr Myeni alleged that he was an employee the onus fell on him to prove that he was indeed an employee.¹⁶³ The court acknowledged that regard must be given to the actual employment relationship and not the “label” attached to that relationship.¹⁶⁴ Section 200A of the LRA stipulates that a person, ‘regardless of the form of the contract,’ is presumed to be an employee if any of the seven factors listed thereunder are triggered. The court *in casu* interpreted the words ‘regardless of the form of the contract’ to mean that there must have been an ‘employment contract or any contractual contract before the rebuttable presumption could be applied.’¹⁶⁵ The court was of the opinion that there was no contract and therefore the rebuttable presumption could not come into play.¹⁶⁶

¹⁵⁷ (2008) 29 ILJ 1480 (LC).

¹⁵⁸ Ibid at para 1.

¹⁵⁹ Ibid at para 3.

¹⁶⁰ Ibid at para 42.

¹⁶¹ Ibid at para 53.

¹⁶² (2015) 36 ILJ 2832 (LAC).

¹⁶³ Ibid at para 26.

¹⁶⁴ Ibid at para 32.

¹⁶⁵ Ibid at para 36.

¹⁶⁶ Ibid at para 41.

*'Kylie' v CCMA*¹⁶⁷

This case involved a sex worker -Kylie. Kylie was informed that her employment was terminated.¹⁶⁸ The determinable issue was whether persons who are involved in illegal work can be considered as employees. The LAC examined the right to fair labour practices in terms of the Constitution¹⁶⁹ and the right to be treated with dignity and held that sex workers were not stripped of their right to dignity and that s23 protects the dignity of those in an employment relationship.¹⁷⁰ The court once again looked beyond the common law illegality of the work and afforded Kylie the right to claim unfair dismissal. As noted by Bosch persons are afraid to bring claims to the courts regarding illegal contracts in the fear of deportation, criminal prosecution,¹⁷¹ this does not mean that they do not have constitutional rights at work.

Butie v MEC Gauteng Department of Health ¹⁷² (*BUTIE*).

This case involved five health workers employed as volunteer care-givers by the Department.¹⁷³ The respondent alleged that these workers were independent contractors and not employees.¹⁷⁴ In *SITA (Pty) Ltd v CCMA*¹⁷⁵ the court held that there are 3 primary criteria in determining whether a person is an employee:

1. an employer's right to supervision and control;
2. whether the employee forms an integral part of the organization with the employer;
3. the extent to which the employee is economically dependent upon the employer.

In Butie it was held that the presence of any one of these factors will generally be sufficient to establish that the person is an employee.

It was mentioned that an employer may exercise a measure of control over independent contractors.¹⁷⁶

¹⁶⁷ (2010) 31 ILJ 1600 (LAC).

¹⁶⁸ Ibid at para 2.

¹⁶⁹ Ibid at para's 16-25.

¹⁷⁰ Ibid at para 26.

¹⁷¹ Craig Bosch; Sarah Christie 'Are sex workers employees' (2007) ILJ, p 807.

¹⁷² (2016) 37 ILJ 1445 (LC).

¹⁷³ Ibid at para 1.

¹⁷⁴ Ibid at para 2.

¹⁷⁵ (2008) 29 ILJ 2234 (LAC) at para 12.

¹⁷⁶ (2016) 37 ILJ 1445 (LC), at para 28.

The LC in *Butie* looked beyond the description of the contractual status contained in contracts and examined the reality of the working relationship. This approach led the court to concluding that even though the individuals agreed to work as volunteers, the substance of the relationship indicated that they were indeed employees of the Department of Health. The court held that who have accepted that an objective evaluation is required when determining the existence of an employment relationship.

*SABC v CCMA*¹⁷⁷

The applicant SABC was a public broadcaster.¹⁷⁸ The respondents entered into a contract with SABC in terms of which they would be appointed as independent contractors, they subsequently claimed that they were conducting work akin to employees and therefore they should be considered as employees. The court incorporated the tests as mentioned above (reality test, dominant impression test, control test), and gave regard to s200A of the LRA. However the LC importantly noted that the contract is often ignored and that is not the correct approach.¹⁷⁹ The court applying the above criteria came to the conclusion that the respondents were in fact independent contractors.

From the above cases it is evident that the courts have dealt with a myriad of cases where the employment relationship was not easily determinable. Benjamin noted that factors such as globalization, deregulation and technological change have increased the variety of forms of work and employers have also disguised employment to avoid labour law regulations.¹⁸⁰ The gig economy does indeed bring a change to the conventional form of work. The Uber platform is a relatively new concept in South Africa however and some Uber drivers are claiming to be employees and not independent contractors. These legal disputes have already made their way into our judicial system. In this regard, the following discussion will examine the recent CCMA *in limine* ruling and the 2018 LAC judgment. However before proceeding on to this case analysis, below I will discuss another important form of work which or

¹⁷⁷ [2017] ZALCJHB 76.

¹⁷⁸ Ibid at para 6.

¹⁷⁹ Ibid at para 42.

¹⁸⁰ Paul Benjamin 'An Accident of History: (Who is and Who should be) an Employee under South African labour Law' (2004) ILJ, p 789.

courts and judiciary system have battled with that being a Temporary Employment Service.

2.13 Temporary Employment Services (TES)

A TES is a triangular relationship which involves the supply of labour by brokers to clients who pay a fee to the broker and the broker in turn pays the worker.¹⁸¹ Section 198 of the LRA provides for the definition and application of a TES. For a person to fall within the definition of a TES there must be the procurement of workers to the client who:

perform work for the client and
who are remunerated by the TES¹⁸²

If an employee is performing work for the client for a period not exceeding three months then that employee is the employee of the TES.¹⁸³ However if the employee is performing work for the client exceeding three months then that employee is the employee of the client.¹⁸⁴ However the provisions of s 198A does not apply to persons earning above the threshold as prescribed by the Minister in terms of the BCEA.¹⁸⁵ Protection is granted to individuals deemed to be employees of the client (that is employees working for the client for a period not exceeding three months) by providing that they must be treated in a manner not less favourable than an employee of the client performing the same or similar work.¹⁸⁶ The client is in fact the entity that controls the actual workplace¹⁸⁷ and it is therefore understandable that legislator had enacted the provision stipulating that the employees working for the client should be treated on the whole not less favourable than an employee of the client.

The drafters Code of Good Practice on 'who is an employee' recognised that even in a triangular relationship the issue of the true nature of the working relationship and whether a worker is an employee or an independent contractor may still arise.¹⁸⁸ The

¹⁸¹ Rochelle le Roux 'World of work: forms of enlargement in South Africa' (2009) Monograph Series, p 21.

¹⁸² Labour Relations Act of 1995, s 198.

¹⁸³ Ibid, s 198A.

¹⁸⁴ Ibid, s 198A.

¹⁸⁵ Ibid, s 198A (2). Section 6 (3) of the BCEA prescribes the threshold.

¹⁸⁶ Ibid, s 198A (5).

¹⁸⁷ Jan Theron 'The Shift to Services and Triangular Employment: Implications for Labour Market Reform' (2008) ILJ, p 12.

¹⁸⁸ Code of Good Practice: 'Who is an Employee,' Part 2, item 56.

code therefore provides that the determination of whether a person supplied to a client via a TES is an employee of that client or an independent contractor must be determined by reference to the ‘actual working relationship,’ between the worker and the client. Furthermore the client and the TES are jointly and severally liable for any contravention regarding any terms and conditions of employment,¹⁸⁹ which is prescribed in terms of s 198 (4) of the LRA.

TES is a form of non-standard employment and a form of externalization.¹⁹⁰ Avoiding the legal framework can be seen as a motivating factor for externalization and labour broking.¹⁹¹ The rise of technology is one such example that has led to the decline of conventional employment.¹⁹² The 2014 amendments to the LRA do not deal expressly with all forms of externalisation but only covers labour broking.¹⁹³

*NUMSA v Assign Services and Others*¹⁹⁴

This is the most recent judgment relating to a TES, this case brought about clarity regarding the dual and sole employment relationship of the parties to a TES. Assign Services was a TES for the purposes of the LRA.¹⁹⁵ Assign provided labour to the client being Krost.¹⁹⁶ Twenty two of the workers supplied by the TES to the client remained in the service of the client for period exceeding three months.¹⁹⁷ The legal issue before the Labour Appeal Court was the correct identification of the worker’s employer once the deeming provision of three months as envisaged in terms of s 198A(3) (b) of the LRA was triggered. Assign claimed that there should be a “dual employment” relationship and that both the TES and the client should remain the employer of the relevant workers.¹⁹⁸ This is where the TES and the client are both the employers of the workers, meaning that the workers will have two employers for the purposes of the LRA. NUMSA on the other hand argued that since the new

¹⁸⁹ Ibid, item 58.

¹⁹⁰ Jan Theron ‘Non-standard employment and labour legislation: The outlines of a strategy,’ (2014) Monograph, p 7.

¹⁹¹ Jan Theron ‘Intermediary or Employer? Labour brokers and the Triangular Employment Relationship’ (2005) ILJ- This article discusses the historical background.

¹⁹² Jan Theron ‘Non-standard employment and labour legislation: The outlines of a strategy,’ (2014) Monograph, p 8.

¹⁹³ Ibid, p 14.

¹⁹⁴ [2017] ZALAC 44.

¹⁹⁵ Ibid at para 3.

¹⁹⁶ Ibid at para 6.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid at para 8.

amendments the client is meant to be the employer once the deeming provision kicks in and the worker should then have only one employee (the sole employment position)¹⁹⁹. The matter went to the LC and the court a quo held that there should be a dual employment relationship. On appeal the LAC took into account s39 of the Constitution, and the purposes of the LRA²⁰⁰ and having regard to these provisions noted that a purposive approach is paramount. The court interpreted the amendments to s198 and 198A to be the sole employment position²⁰¹ and that the very purpose of the amendments was to protect vulnerable employees and that s198A (4) of the LRA is meant to protect employees from the TES and clients who wished to avoid their obligations in terms of s198A 3 (b) of the LRA.²⁰² The court stated that the mere provisions of s198A is that the ‘employees are not treated differently from the employees employed directly by the client.’²⁰³ The court emphasised that the purpose of this it to ensure that a TES remains true in its nature of being a TES. The court further held that the provisions in terms of the LRA of “joint and several liability” provide an employee with protection of receiving remuneration from a TES who continues to pay the employee, this does not mean that the TES is also now the employer of the employee.²⁰⁴ The court noted that the employment relationship between the client and the employee is created by operation of law ‘independent of the terms of contract between placed worker and the TES.’²⁰⁵ This in my opinion is the most propitious interpretation of the LRA especially having regard to our constitutional duty of maintaining fair labour practices and the protection of vulnerable workers.

I will discuss the recent CCMA ruling and the LAC judgment regarding Uber drivers further on in this chapter and under that section I will discuss the application of a TES with regard to Uber drivers.

¹⁹⁹ Ibid at para 9.

²⁰⁰ Ibid at para 28-31.

²⁰¹ Ibid at para 38.

²⁰² Ibid at para 39.

²⁰³ Ibid at para 40.

²⁰⁴ Ibid at para 44.

²⁰⁵ Ibid at para 45.

2.14 Common Law

Our common law is derived from Roman- Dutch law and the English system of law. The Master and Servant Act was introduced in 1856 in South Africa.²⁰⁶ The law under this Act made a breach of contract criminally punishable. Nonetheless certain protections were still afforded to person under contractual control such as paid sick leave and notice periods.²⁰⁷ The laws under the Master and Servant Act were predominantly one sided in favour of the “Master.”²⁰⁸ The law of “Master and Servant” was so deeply entrenched in our law that as a result employment contracts at the time set a firm foundation for the regulation of an employment relationship.²⁰⁹ An employment contract stipulates the rights and duties of both employer and employee, like any other contract an obvious assumption would be that both parties are bound to the stipulations of their respective contracts. However after the constitutional dispensation common law had to be interpreted with regards to ‘fair labour practices.’²¹⁰

From the above it can be seen that certain labour protections can only be effected through the applications of our labour law framework as it is only available to employees. However this does not mean that that categorization of Uber drivers as independent contractors closes the doors of protection available to them. This proposition was tested in two legal cases which are discussed below.

2.15 CCMA 2017 AWARD RECOGNISING UBER DRIVERS AS EMPLOYEES

The CCMA had to address the issue of whether Uber drives are employees of Uber Technologies South Africa (Pty) Ltd for the purposes of s213 of the LRA.²¹¹ The matter arose as a result of certain Uber drivers being “deactivated,” and lodging claims

²⁰⁶ Rochelle le Roux ‘*The Evolution of the Contract of Employment in South Africa*’ (2010) ILJ, p 142.

²⁰⁷ Ibid.

²⁰⁸ Ibid, see discussion by le roux on how a claim for unpaid wages had to be instituted via civil action even though breach of contract was a criminal offence for the servant.

²⁰⁹ *masters and servants act used to regulate employment in sa- Wikipedia*

²¹⁰ Du Toit et al *The Labour Relations Law: A Comprehensive Guide*, 6-ed, (2015), LexisNexis, South Africa, p105.

²¹¹ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU and Others* (2017) In Limine Ruling (CCMA) at para 8.

of unfair dismissals to which Uber SA responded that the drivers are not employees of Uber SA and as such the CCMA cannot entertain the matter.²¹²

Uber specifically states that its drivers are appointed as independent contractors.²¹³ It has been noted that Uber drivers have the liberty of choosing when they wish to drive by logging onto the app as they desire, they do not have to meet a minimum amount of driving per week or per month, they may however become “archived,” if they are inactive however they can become reactivated.²¹⁴

When a ride is “requested,” the closest driver is notified and has the option to accept or reject the ride, riders and drivers both have the options of cancelling their “trips,” there is however an average amount of cancelling which may result in deactivation.²¹⁵

The fee is deducted through the app, however Uber then pays the partner, further with regards to the partner, he/she may retain a fee for the use of his/her vehicle and pay the balance to the driver, invoices are given to drivers by Uber.²¹⁶

Performance standards are determined in the form of “ratings,”-in Cape Town the rating of 4 must be maintained or else drivers run the risk of being deactivated.²¹⁷

In terms of Uber's policy if there is a dispute between Uber and its drivers it must be resolved by International Chamber of Commerce for Mediation and Arbitration.²¹⁸

Uber raised 6 points in its arguments that the drivers are not employees.²¹⁹

1. There is no obligation to use the app or drive any Uber registered vehicle.
2. There is no instruction for a driver to drive his vehicle, the driver has a choice which rides to accept and where to drive.

²¹² Ibid at para 10.

²¹³ Ibid at para 14.

²¹⁴ Ibid at para 15.

²¹⁵ Ibid at para 17.

²¹⁶ Ibid at para 18.

²¹⁷ Ibid at para 19.

²¹⁸ Ibid at para 22.

²¹⁹ Ibid at para 25.

3. Partner drivers have the discretion to employ other drivers to drive.
(This is still subject to Uber's approval).
4. Drivers are free to work elsewhere.
5. The partner is required to supply the vehicle and is liable for all the expenses associated with it.
6. The partner bears the loss and profit in his capacity as an independent contractor, the driver is also free to move from one partner to the next.

It was argued that the contract should be the point of departure in determining the status of the drivers.²²⁰

An important issue raised by the respondents is that unlike other technological platforms the riders are not the ones contracting the drivers as independent contractors it is Uber itself that is doing this.²²¹

Uber has control over the prices charged and the number of drivers in a specific location or city.²²² If the drivers were independent contractors they would be able to determine this and not Uber.²²³

Uber sets the prices which the driver has no control over, the rider has no knowledge of the drivers, the driver are only aware of the destination upon pick up, besides the name and current location of the rider the Uber driver has no access to a personal formation of the rider and therefore cannot be seen to be economically dependent upon the rider but more on Uber.²²⁴

CCMA has noted that the drivers are essential to Uber. The drivers ultimately transport the drivers to their destination.²²⁵

CCMA FINDING

The CCMA found that s213 (b) of the LRA is wide enough to include Uber drivers. The Commissioner made reference to control test, organizational test, economic dependence test and dominant impression tests.²²⁶ In the opinion of the

²²⁰ Ibid at para 26.

²²¹ Ibid at para 27.

²²² Ibid at para 28.

²²³ Ibid.

²²⁴ Ibid at para 47.

²²⁵ Ibid at para 49.

²²⁶ Ibid at para 39.

Commissioner, the tests developed have become unhelpful in that some point towards independent contractors and others to employees.²²⁷

With regards to the drivers being subject to the partners by driving their vehicles, reference is made to item 37 of the Code of Good Practice which states that:

“A relevant factor would be the extent to which the employer exercises control over a decision to terminate the services of persons engaged by the sub-contractor.”

The CCMA thus held that the drivers are employees of Uber SA.

2.16 The Labour Court

Uber SA subsequently approached the LC. The court notes that Uber BV is a company in the Netherlands and Uber BV owns and operated an application called Uber.²²⁸ Uber SA brought an application to review and set aside the ruling of the commissioner, discussed above.²²⁹ Uber BV was not a party to the CCMA proceedings.²³⁰ Uber SA’s argument was that there was no contractual relationship between Uber SA and the drivers and that the contractual relationship was between the Uber BV and the drivers and that in any event the drivers were independent contractors and not employees.²³¹ Uber BV is the party that licenses the Uber application.²³² The court stated that since Uber BV was not a party to the application it was not necessary to determine whether Uber BV is a technological or transportation company.²³³ The court considered the contractual relationship between Uber BV and Uber SA, the contract so applicable states that Uber BV is the entity that provides the services on an intermediary to the partners/drivers which then in turn provides the on-demand service, further in terms of the agreement Uber SA is to provide support services to Uber BV.²³⁴ Uber SA does not enter or negotiate any agreements on behalf of Uber BV and as such is not entitled to conclude contracts with the drivers.²³⁵ Uber

²²⁷ Ibid.

²²⁸ *Uber South Africa Technology Services Pty (Ltd) v NUPSAW & Others* (C449/17) [2018] ZALCCT 1, at para 1.

²²⁹ Ibid, at para 3.

²³⁰ Ibid, at para 11-18.

²³¹ Ibid, at para 20.

²³² Ibid, at para 26.

²³³ See ft 8 of the judgment.

²³⁴ Ibid, at para 27.

²³⁵ Ibid.

BV is ultimately the party that decides to deactivate any drivers and not Uber SA.²³⁶ The drivers claimed that since Uber SA was the local entity through which Uber BV was operating, Uber SA should be their employer.²³⁷ The drivers claimed that Uber BV is the founding company and Uber SA their local entity and their training is done locally in Cape Town and if there are any issues they direct these issues to Uber SA and further they are paid in local currency and upon deactivation they negotiate with Uber management in Cape Town to be reactivated.²³⁸ Uber SA stated that any payment is done from Uber BV to the partner and the payment between the partner and driver is a matter between the partner and the driver.²³⁹ The LC held that the commissioner conflated Uber SA and Uber BV.²⁴⁰ The LC held that the commissioner ought to have considered that no contractual relationship existed between the drivers and Uber SA and this was indeed fatal to the case of the drivers.²⁴¹ The LC left the question open as to whether or not the drivers are employees of Uber BV as it was not called upon to determine this.²⁴²

Given the discussion on the above tests used by our courts and adopting a purposive approach it will be argued that had Uber BV been cited as a party as opposed to Uber SA, an employment relationship would prevail.

The CCMA rejected the argument that the partners are the employer of the driver, I beg to differ on this aspect as I have above discussed the application of TES. In my view if the driver is remunerated by the partner for a period not exceeding three months the Uber driver should be considered as the employee of the partner, if however the partner is working for a Uber for a period exceeding three months then Uber should be considered as the employer. However joint and several liability as prescribed in terms of s 198 (4) of the LRA should be applied.

²³⁶ Ibid.

²³⁷ Ibid, at para 35.

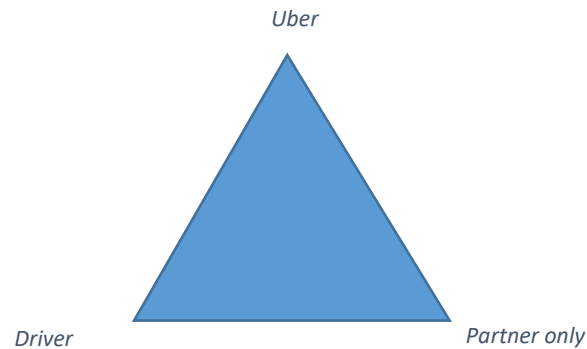
²³⁸ Ibid, at para 44.

²³⁹ Ibid, at para 54.

²⁴⁰ Ibid, at para 59.

²⁴¹ Ibid, at para 72.

²⁴² Ibid, at para 98.



As stated the partner only supplies the car to the driver and does not conduct the job himself/herself and is further responsible for the payment of the driver. In the same way a TES provides the services to the client, in this case the TES being the partner supplying the drivers to Uber.

The CCMA also recognised their potential collective bargaining rights and stated that they are currently into ‘worker/driver groups such as The Guild and The Movement’.

By simply agreeing to the terms and conditions of Uber, the driver is already placed in a position of unequal bargaining power.

2.17 Conclusion

It is evident from the above discussion that South Africa’s legal framework is comprehensive in that it adheres to the principles as enshrined in the Constitution and regard is given to the ILO instruments. Our courts have a duty in terms of the Constitution in applying the above provisions in a manner that best protects vulnerable workers and affords them the rights that they are entitled to. It is submitted that while South African law can deal with issues faced by Uber drivers and other similar classes of workers, there is a need for current jurisprudence to develop in order to respond to the new forms of work that are being created through technological advancements in current day South Africa. In the next chapter I will discuss international law as well as how SA can incorporate certain recommendations from the UK perspective.

CHAPTER 3: UK employment law, policy recommendations and relevant case law

3.1 Introduction

In chapter two, the relevant legal framework was discussed and it is evident therefrom that South African law distinguishes between employees and independent contractors in its regulation of these two categories. However, given the changing world of work, many workers may find themselves on the border line between these two categories. This challenge is not peculiar to South Africa but occurs in other jurisdictions as well, including the United Kingdom (UK).

The UK has recently been faced with legal battles regarding the status of Uber drivers and has made significant research regarding workers in the gig-economy. The following chapter provides a brief comparative study of the prevailing legal position adopted by the UK towards Uber drivers. The third category of workers in the UK, being the ‘worker’ category, will be examined. The purpose of this chapter is therefore to draw on the pertinent aspects from the position adopted by the UK, specifically, recent policy, legislative and jurisprudential developments. This chapter is structured as follows. Firstly, the scope of legal protection granted to various categories of workers is discussed. Thereafter, the judicial tests applied by the UK courts in determining the employment status of parties will be examined. Finally, recent developments in the UK pertaining to Uber drivers will be discussed such as policy recommendations and thereafter recent case law examined.

3.2 Employment status in the United Kingdom

The employment contract in the UK has its roots in the Master Servant Act.²⁴³ Under this Act, labourers were subject to criminal punishment for any wrongdoing²⁴⁴ and it was an offence for labourers to end their contracts before its expiration time.²⁴⁵ Imprisonment for periods up to three months was imposed for absconding from work and for refusing to enter into work.²⁴⁶ Servants who terminated their contracts without notice were not paid even if the work had been completed.²⁴⁷ During the 1960s and

²⁴³ Deakin S & Gillian S Morris *Labour Law* 6th ed (2012), Hart Publishing, Oregon, p 21. South African also bears the same resemblance- see chapter 2.

²⁴⁴ S.Deakin ‘*The Contract of Employment: A Study in Legal Evolution*,’ WP203 (2001), p19.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

1970s, employment protection was extended to employees²⁴⁸ in the form of certain protections such as against loss of income and employment, and minimum notice periods for termination of employment contracts.²⁴⁹ Legal reform during this period was brought upon by factors such as the impact of collective bargaining which led to collective agreements being incorporated into individual employment contracts and this also resulted in a decrease of individual litigation over contractual rights.²⁵⁰ The existence of an employment contract, however, remained a qualifying prerequisite in terms of the newly-introduced employment legislation.²⁵¹ The *Fairness at Work White Paper* aimed at achieving an effective fair labour market,²⁵² acknowledges that the world of work is changing and that flexible working arrangements are on the rise.²⁵³ It has, furthermore, been acknowledged that flexible working conditions may come with potential abuse for the worker and it was therefore suggested that the national minimum wage be applied to workers in flexible working conditions and not only to those who work under a contract of employment.²⁵⁴ It was also suggested that legislation should be broadened by regulation of existing rights to those persons who work for another.²⁵⁵ Since most of the rights in the Employment Rights Act²⁵⁶ (ERA) were for the protection of employees, these rights were extended to those persons who fell within the newly introduced ‘worker’ category.²⁵⁷ In terms of the ERA’s scope of application, the Act does not apply to independent contractors.²⁵⁸ An ‘employee’ is entitled to the benefits in terms of the ERA, and so are ‘workers’ albeit to a limited extent.

²⁴⁸ However the contract of employment was the basis of regulation of the employment relationship. The distinction between manual and non-manual labour was reinstituted into early social laws and as such the control tests was established. To a certain extent the distinction between ‘servant’ and ‘employee’ was attributed to manual and non-manual work, for example the National Insurance Act 1946, defined an employee as ‘any persons gainfully occupied in employment ... being employed under a contract of service’ and as such employment protection legislation during the 1960’s emulated the same distinction – Simon Deakin & Gillian S Morris *Labour Law* 6th ed (2012) p 26-31.

²⁴⁹ Simon Deakin & Gillian S Morris *Labour Law* 6th ed (2012), Hart Publishing, Oregon, p 25.

²⁵⁰ Ibid, p 24-25.

²⁵¹ Ibid, p 26.

²⁵² ‘*Fairness at Work*’ Presented to Parliament by the President of the Board of Trade by Command of Her Majesty, (May 1998), p 2.

²⁵³ Ibid, p 5.

²⁵⁴ Ibid, p 15.

²⁵⁵ Ibid, p 35.

²⁵⁶ Employment Rights Act, 1996.

²⁵⁷ ‘*Fairness at Work*’ Research Paper 98/99 (November 1998), p 29. See ERA definition of worker (s230 (3))- The National Minimum Act also now applies to workers .

²⁵⁸ Simon Deakin & Gillian S Morris *Labour Law* 6th ed (2012), Hart Publishing, Oregon, p 131.

In this regard, the ERA defines an ‘employee’ as an individual who has entered into or works under a contract of employment.²⁵⁹ The definition of contract as provided for in the ERA is a ‘contract of service or apprenticeship, express or implied, oral or in writing.’²⁶⁰ In terms of the ERA, all employees are classified as workers and have certain employment rights and legal duties. In this regard, employees have access to all the rights which workers have and, in addition, they are afforded statutory sick leave;²⁶¹ statutory maternity;²⁶² paternity;²⁶³ adoption²⁶⁴ and shared parental leave;²⁶⁵ minimum notice periods for termination of employment;²⁶⁶ protections against unfair dismissals;²⁶⁷ the right to request for flexible working;²⁶⁸ time off for dependants²⁶⁹ and statutory redundancy pay.²⁷⁰ In an employment relationship, there must exist mutuality of obligation between the employer and employee and,²⁷¹ furthermore the employee must provide the services personally.²⁷²

The ‘worker’ category in the UK was introduced in response to development in EU legislation and as a result of the acknowledgment of the shift away from conventional employment.²⁷³ A ‘worker’ is defined as an individual who has entered into or works under a contract of employment or any other contract (express, implied, oral or in writing).²⁷⁴ This ‘worker’ undertakes to do or perform personally any work or services for another party.²⁷⁵ The other contracting party’s status is not by virtue of the contract that of a client or a customer of any profession or business undertaking carried on by that party to the contract.²⁷⁶ For example X enters into a contract of employment with Y to personally provide work and or services to Y, X undertakes to

²⁵⁹ Employment Rights Act, 1996, s 230.

²⁶⁰ Ibid.

²⁶¹ Ibid, s 88.

²⁶² Ibid, s 71.

²⁶³ Ibid, s 80.

²⁶⁴ Ibid, s 75A.

²⁶⁵ Ibid, s 75E.

²⁶⁶ Ibid, s 86-87.

²⁶⁷ Ibid, part X.

²⁶⁸ Ibid, s 80F.

²⁶⁹ Ibid, s 57A.

²⁷⁰ Ibid, s 135.

²⁷¹ Simon Deakin & Gillian S Morris *Labour Law* 6th ed (2012), Hart Publishing, Oregon, p 153.

²⁷² Ibid. The author discusses clauses in an employment contract which can cause courts to come to the conclusion that there is no employment status clauses which lack the mutuality of obligations or personal service.

²⁷³ Brhmi Balaram, Josie Warden and Fabian Wallace-Stephens ‘Good Gigs- A fairer future for the UK’s gig economy’ (2017), p 37.

²⁷⁴ Employment Rights Act, 1996, s 230 (3).

²⁷⁵ Ibid.

²⁷⁶ Ibid.

do the work personally for Y, and Y is not part of a business undertaking to another party and is not a client of another party.

Those persons who qualify as ‘workers’ are entitled to- limited employment rights. In this regard, they are only afforded the following rights: a right to the national minimum wage;²⁷⁷ protection from unlawful deductions from wages;²⁷⁸ protection from excessive working hours;²⁷⁹ health and safety at work;²⁸⁰ certain collective rights;²⁸¹ and equal pay.²⁸² Due to the introduction of the worker category in the UK and the granting of rights to this category it is seen that the British law is more progressive in this regard.²⁸³ However, classifying persons as ‘workers’ can be open to abuse and a way for employers to bypass the full complements of duties imposed on them towards ‘employees’ proper. In this regard, The Commission of European Communities argued that it is ‘artificial’ to suggest a third category as it is a means of reducing protection enjoyed by employees and that the real issue is the existence of sham employment contracts.²⁸⁴ It has been suggested that when adding a third category the goal should be to provide partial protection to those who are not within the group of employees and not as a means of misclassification by way of when sham contracts.²⁸⁵

Similar to the South African position, in the UK, an ‘independent contractor’ is understood as someone who is not subject to the control and direction of another.²⁸⁶ They usually work under a contract of service²⁸⁷ and are genuinely self-employed.²⁸⁸ Self-employed persons are not entitled to the same protections afforded to employees.

²⁷⁷ Simon Deakin & Gillian S Morris *Labour Law* 6th ed (2012), Hart Publishing, Oregon, p 174.

²⁷⁸ Ibid.

²⁷⁹ Ibid.

²⁸⁰ Ibid, p 175.

²⁸¹ Ibid.

²⁸² Ibid, p 176.

²⁸³ The Commission of the European Communities green paper: *Modernising Labour Law to Meet the Challenges of the 21st Century* (2006), p 15.

²⁸⁴ Ibid, p 16.

²⁸⁵ Ibid.

²⁸⁶ Simon Deakin & Gillian S Morris *Labour Law* 6th ed (2012), Hart Publishing, Oregon, p 145.

²⁸⁷ Harry Hutchison ‘Subordinate or Independent, Status or Contract, Clarity or Circularity: British Employment Law, American Implications,’ *International and Comparative Law Journal* Vol 28:55.

²⁸⁸ Jeremias Prassl and Martin Risak ‘Rethinking the Legal Analysis of Crowdwork’, forthcoming comparative law and policy journal, p 3.

Notwithstanding these persons do have rights limited to health and safety protection, as well as equality protections.²⁸⁹

The distinction between the three categories in the UK have led to uncertainty of status in employment relationships and therefore, similar to South Africa, the courts in the UK have been called to determine the true nature of employment status and have developed tests to this effect. Below I will discuss the judicial tests used by the UK courts to determine the extent of protections granted to specific persons.

3.3 The judicial tests used to determine employment status in the United Kingdom

The courts in the UK describe ‘sham contracts’ as contracts where the terms differ from the actual rights and obligations intended by the parties so concerned.²⁹⁰ There has been cases in the UK where contracts state that the person performing the work need not perform the work themselves and, in that way, employment is disguised.²⁹¹ The definition of an ‘employee’, ‘worker’ or ‘independent contractor’ as provided for in the legislation may at times not be sufficient in determining which category a person should fall within. Thus, for example, in the case of *Express & Echo Ltd v Tinton*,²⁹² the courts looked beyond the ‘label’ attached to the contract,²⁹³ as this might in essence not reflect the true nature of the working relationship.

In the UK, therefore, a court or an employment tribunal is able to make the final decision concerning a person’s employment status. The various tests used by the courts are the following:

- a) The control test where the degree of control exercised by the employer is assessed.²⁹⁴ The control test usually involves factors such as obeying orders, control of working hours and supervision.²⁹⁵ In the case of *Ready Mixed*

²⁸⁹ Simon Deakin & Gillian S Morris *Labour Law* 6th ed, Hart Publishing, Oregon, p 146. The Health and Safety at Work Act 1974, Equality Act 2010.

²⁹⁰ Fabian McNeilly ‘*Sham Self-Employment Contracts: Taking a Liberty?*’ Manchester Student Law Review (Vol 2:15), p 16.

²⁹¹ Ibid, p 18.

²⁹² [1999] ICR 693.

²⁹³ S. Deakin ‘*Interpreting Employment Contracts: Judges, Employers, Workers*’ ESRC (Working Paper No. 267), p 4.

²⁹⁴ Good Work: The Taylor Review of Modern Working Practices, (2017), p 33.

²⁹⁵ S. Deakin ‘*Interpreting Employment Contracts: Judges, Employers, Workers*’ ESRC (Working Paper No. 267), p 3.

Concrete (South East) Ltd v Minister for Pensions and National Insurance,²⁹⁶ it was stated that all aspects of control must be considered when determining whether the relationship is to such a degree of one of ‘master and servant.’

- b) The integration test/ organization test where the court assesses whether the individual is subject to the rules and procedures of the organisation as opposed to his/her own will.²⁹⁷
- c) The multiple factor test/ mixed test. This test looks at all the factors of a particular case. The case of *Ready Mixed Concrete*²⁹⁸ dealt with concerned a lorry driver who delivered cement for Ready Mixed Concrete. The driver was to buy the lorry in terms of a hire purchase agreement, however, on condition that the lorry be painted according to the colours of the company. Furthermore, the driver had to work certain hours a week and was required to wear a certain uniform. According to the contract, he was described as an ‘independent contractor’. Despite the measure of control in that the driver had to obey orders, the court held that he was self-employed as he personally carried the risk of profit and loss. Therefore applying this test must be balanced out by the courts.²⁹⁹
- d) The mutuality obligation test: with this test, the court looks at whether there are contractual obligations to provide and perform work.³⁰⁰ The factors considered are the following: the duration of employment, the regulation of employment, and the right of refusal to do the work.³⁰¹ The employer provides instructions and the employee is in a position of subordination.³⁰² The employee is then entitled to certain protections such as those prescribed in the ERA.³⁰³ The case of *O’Kelly v Trusthouse Forte plc*³⁰⁴ - involved wine waiters who were employed as ‘regular casuals’ who were hired periodically to do their work. The employer had a ‘preferential list’ of names of waiters who would be allocated work. If the waiters refused to do work for the employer

²⁹⁶ [1968] 2 QB 497, 515.

²⁹⁷ Simon Deakin & Gillian S Morris *Labour Law* 6th ed (2012), Hart Publishing, Oregon, p 161.

²⁹⁸ [1968] 2 QB 497, 526.

²⁹⁹ Simon Deakin & Gillian S Morris *Labour Law* 6th ed (2012), Hart Publishing, Oregon, p 170.

³⁰⁰ Good Work: The Taylor Review of Modern Working Practices, (2017), p 33.

³⁰¹ S. Deakin *Interpreting Employment Contracts: Judges, Employers, Workers* ESRC (Working Paper No. 267), p 3.

³⁰² Ibid, p 6.

³⁰³ Ibid, p 6.

³⁰⁴ [1983] ICR 728.

they were taken of the preferential list. When this occurred, the waiters claimed that they had been dismissed for reasons relating to their trade union membership. They claimed they were employees of the company, however, the Employment Tribunal disagreed and found that there was no obligation on the company to provide any work and no obligation on the applicants to provide their service.³⁰⁵

The courts apply the above mentioned common law tests as opposed to merely looking at the contract in order to determine the employment status.³⁰⁶

From the aforementioned tests, it is evident that there are marked similarities between the tests used by the UK courts as compared to the common law tests used by South African courts. Our courts have taken cognisance that control can no longer be the decisive factor in determining which category a person falls within.³⁰⁷ The dominant impression test employed in South Africa is a combination of the control test, the organisational test and the reality tests. Our courts look at the overall working relationship between the parties when deciding their employment status.³⁰⁸ In both the UK and South Africa, the contract between the parties is not determinative when issues around employment status arise.³⁰⁹ Notably, it is only recently that UK courts have moved away from the sole focus on the contractual agreements between the parties and now focus on the true nature of the working relationship.³¹⁰

For example, in *Autoclenz Ltd v Belcher and others*,³¹¹ Autoclenz provided car cleaning services³¹² and entered into a contract with British Car Auctions. The claimants were valeters who provided services at British Car Auctions.³¹³ The claimants claimed that they were workers in terms of the National Minimum Wage

³⁰⁵ [1983] ICR 730, 744. See also B.Burchell 'The_Employment_Status_of_Individuals_in_Non-standard_Employment' (1999), p 10.

³⁰⁶ S. Deakin 'Interpreting Employment Contracts: Judges, Employers, Workers' ESRC (Working Paper No. 267), p 2.

³⁰⁷ See my discussion in chapter 2 on the *Smit* case whereby it was held that control can no longer be the decisive factor.

³⁰⁸ See discussion in chapter 2.

³⁰⁹ Guy Davidov, Mark Freedland & Nicola Kountouris 'The Subjects of Labor law: "Employees" and Other Workers' (Matthew Finkin & Guy Mundlak Eds., Edward Elgar (2015), p 3.

³¹⁰ Ibid, p 4- *Stringfellow's Restaurants Ltd v. Quashie* [2012] EWCA Civ. 1735, [2007] UKEAT 296 (I.R.L.R.).

³¹¹ [2011] IRLR 820 SC.

³¹² Ibid, at para 1.

³¹³ Ibid, at para 1

Act³¹⁴ (NMWA) and in terms of the Working Time Regulations Act³¹⁵ (WTRA) and were thus entitled to the national minimum wage and statutory paid leave.³¹⁶ The court had to consider the term ‘worker’ and reverted to the statutory definition in terms of the NMWA³¹⁷ and the WTRA³¹⁸ (which bears reference to the ERA definition as mentioned above). In terms of the contract the claimants were described as ‘subcontractors’ and as ‘self-employed persons’.³¹⁹ The valeters were required to wear protective overalls that identified them as contractors of *Autocleanz*.³²⁰ The claimants were paid on a piecemeal basis and they were responsible for payments of tax and national insurance.³²¹ It was stated that the only time that it can be argued that a contract contains a term ‘inconsistent’ with an express term is when that contract does not reflect the true agreement of the relationship,³²² and that a reality test should be adopted.³²³ The court found that the claimants were employees and looked beyond the contract and held that the contract reflected a false picture as to the true nature of the working relationship.³²⁴

In the recent months, there has been policy recommendations in the UK regarding the principles of fair labour practices in respect of gig-economy workers. In this regard, the subsequent section provides an overview of the pertinent policy recommendations with a specific focus on Uber drivers.

3.4 Recent developments in the UK in respect of the gig-economy, with a specific focus on the Uber arrangement

Since the mid 1970’s, the European Union had a huge impact on the UK due to the UK being a member state of the EU.³²⁵ The objectives of the EU, are to promote the well-being of people aiming at full employment and social progress and combatting exclusion and discrimination.³²⁶ The EU has incorporated treaties and

³¹⁴ National Minimum Wage Act, 1998.

³¹⁵ The Working Times Regulation Act 1998.

³¹⁶ [2011] IRLR 820 SC, at para 1.

³¹⁷ National Minimum Wage Act, 1998, s 54.

³¹⁸ The Working Times Regulation Act 1998, s 2.

³¹⁹ [2011] IRLR 820 SC, at para 4.

³²⁰ *Ibid*, at para 7.

³²¹ *Ibid*, at para 14.

³²² *Ibid*, at para 20.

³²³ *Ibid*, at para 22.

³²⁴ *Ibid*, at para 29-32.

³²⁵ ‘UK Employment Rights and the EU’ TUC, p 2.

³²⁶ *Ibid*, p 3.

directives regarding employment protections, health and safety as well as equality.³²⁷ Being a member of the EU means that individuals in the UK are able to approach the European Court of Justice (ECJ) if they are not satisfied with the outcomes of UK courts and tribunals relating to rights of EU employment.³²⁸ Certain EU judgements prompted significant changes in laws such as the *Defrenne* case³²⁹ which dealt with equal pay between men and women.³³⁰

The Commission of the European Communities Green Paper³³¹ was meant to bring forward a public debate on how labour law can be transformed to keep pace with modernization. It was stated in this paper that labour markets need to be more aware and adapt to innovation and change in the labour field.³³² It was also stated that the traditional binary distinction between an employee and independent contractor is no longer viable.³³³ Disputes regarding employment relationships may arise when there is a ‘sham’ contract and also where there are difficulties in trying to fit these working arrangements within the conventional employment relationships.³³⁴

In the UK it has been acknowledged that atypical employment is on the rise³³⁵ with an estimated 1.3 million (which comprises 4% of total employment) people working in the gig economy.³³⁶ It has been recorded that 58% of people working in the gig economy in the UK are permanent employees employed elsewhere whilst at the same time engaging in work in the gig economy.³³⁷ There is therefore an acknowledgment in the UK that the world of work is changing and it has been suggested that the courts ‘should do less and legislature more’ in keeping up with these trends and specifically with providing clarity between worker status and genuinely self-employed persons.³³⁸

³²⁷ Ibid. The article discusses important rights which the UK incorporated as a result of the EU such as paid holidays, safety and health, unpaid parental leave, equal treatment for part-timed, fixed-term and agency workers.

³²⁸ Ibid, p 15.

³²⁹ Case 43/75, *Defrenne* (No.2) v. Sabena (1976) ECR 455 at 470.

³³⁰ Michael Ford ‘*The Impact of Brexit on UK Labour Law*’ International Journal of Comparative Labour Law, 32, no. 4 (2016): 473–496. p 476.

³³¹ The Commission of the European Communities green paper: Modernising Labour Law to Meet the Challenges of the 21st Century (2006), p 3.

³³² Ibid, p 8.

³³³ Ibid, p 10.

³³⁴ Ibid.

³³⁵ Good Work: The Taylor Review of Modern Working Practices, (2017), p 22.

³³⁶ Ibid.

³³⁷ Ibid, p 25.

³³⁸ Good Work: The Taylor Review of Modern Working Practices, (2017), p 33.

It is against this background that an independent review of modern working practices was undertaken by Matthew Taylor, chief executive of the Royal Society of Arts, on instruction by the Majesty's Government to develop proposals towards the improvement of UK citizens.³³⁹ The final product of this review was the 2017 publication of 'Good Work: The Taylor Review of Modern Working Practices',³⁴⁰ (The Taylor Review). The independent review analyses the impact of new forms of work on the rights of workers as well as responsibilities.³⁴¹

The report's main premise is that all work, including gig-economy work in the UK, should be fair and decent and that work should lead to improved human development and self-fulfilment in that people should be treated with respect and dignity at work.³⁴² Significantly, the report also recognises that in the modern economy of technology and development of new business models an approach that is up to date and responsive, bearing in mind the concept of 'fairness' is needed to respond to persons with lower incomes, especially issues such as health and well-being within the workplace.³⁴³

The report, therefore, sets out seven steps to address the challenges facing the UK labour market:³⁴⁴

1. The first step is acknowledging the role of good work for all. There must be a balance between rights and responsibilities. There must be an adaption to technological innovation and technological changes, as technology can be seen as a means for better regulation and flexibility for persons to organise;
2. It is acknowledged that platform work provides opportunities' and flexibility for those unable to pursue conventional work. There should be fairness for persons working on these platforms;
3. The enforcement of laws should assist firms and individuals in knowing and enforcing their rights. It is suggested that 'dependant contractors' be granted more protections;

³³⁹ Ibid, p 4.

³⁴⁰ 'Good Work: the Taylor Review of Modern Working Practices'
<https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices>, accessed 31 January 2018.

³⁴¹ Ibid.

³⁴² Good Work: The Taylor Review of Modern Working Practices,(2017), p 6.

³⁴³ Ibid.

³⁴⁴ Ibid, p 9.

4. National regulation is not sufficient in achieving better work, better corporate governance, management and employment relations within an organisation is needed;
5. Persons should feel able to strengthen the future of their work and enhance formal and informal learning regarding job activities;
6. Workplace health should be of paramount importance;
7. The National Living Wage should be enhanced by sectorial strategies between employers, employees and stakeholders and in particular to low paid sectors.

The report recognises that in the UK, a person is not considered a worker if that person has a right of substitution.³⁴⁵ For example, if X is employed as worker by Z, X cannot find a substitute to fill in for him if he is unable to do the work for a specific day. If there is an agreement between X and Z that X may appoint someone to do his work if he is unable to, then X will not be regarded as a ‘worker’, despite the fact that that person(X) may have the most part of their work controlled. This is therefore a barrier for such persons.³⁴⁶ It has, therefore, been suggested in the Taylor Review that the definition of ‘control’ should be adapted to today’s changing world of work.³⁴⁷ It has been suggested that the fact that the X, for instance, does not perform work personally should not act as a barrier to employment rights, and if the courts paid more attention to the element of control as opposed to ‘personal service’, more persons would be protected by employment law.³⁴⁸ The proposal is that legislation should outline what ‘control’ means in the modern day world of work and it should not bear the definition of mere ‘day-to-day supervision’.³⁴⁹

The report, furthermore, states that 14% of workers in the gig-economy engage in this type of work because they could not find traditional job, whilst 68% said that they were satisfied with the gig economy work they did.³⁵⁰ Persons working in the gig-economy are on the rise and these persons should receive more support from the government such as encouraging them to plan for their future, especially retirement savings, ill health savings, and so forth.³⁵¹ Self-employment is seen by certain persons

³⁴⁵ Ibid, p 36.

³⁴⁶ Ibid, p 36.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Ibid, p 51.

³⁵¹ Ibid, p 73-74.

as a group of individuals who do not require anything from the state and who take certain risks in growing a business with the hope of creating employment for others.³⁵² However, this is not the case for the most individuals who are categorised as ‘self-employed.’³⁵³ For some, self-employment is not a choice as it is the only form of work available to them.³⁵⁴ It has, therefore, been recommended in the report that the UK Government should acknowledge that certain self-employed persons require intervention and legal protections.³⁵⁵

In the UK, it has been shown that majority of persons in the gig-economy (58% of them) are pursuing work in the gig-economy in order to supplement their income.³⁵⁶ It will, therefore, be wrong to suggest that all employees in the gig-economy should be entitled to employment benefits. However with regards to the Uber platform, it may very well in essence be shown (by proving that the reality of the working relationship is that of an employee, or that the person is a ‘worker’ as opposed to an independent contractor) that they are indeed entitled to employment benefits. The UK has taken an initiative to recognise that gig work is on the rise and there has been significant research undertaken on this front. It is therefore, suggested that South Africa should do more by conducting similar research and by determining the exact amount of persons working in the gig economy, as well as their reasons for doing so.

Earlier in 2017, the publication of the ‘Good Gigs: A Fairer Future for UK’s Gig-Economy’³⁵⁷ (The Good Gigs Report) further noted that gig work is on the rise and envisions for fair and fulfilling work in today’s evolving labour market and how developments of technology can still benefit workers.³⁵⁸ The gig-economy is likely to grow and government needs to take cognisance of this.³⁵⁹ It was suggested in the Good Gigs Report that Government can do this by clarifying law and deterring misclassification.³⁶⁰ There should be good work for all regardless of employment status.³⁶¹

³⁵² Ibid, p 75.

³⁵³ Ibid, p 75.

³⁵⁴ Ibid.

³⁵⁵ Ibid.

³⁵⁶ Ibid, p 25.

³⁵⁷ Brhmie Balaram, Josie Warden and Fabian Wallace-Stephens ‘Good Gigs- A fairer future for the UK’s gig economy’ (2017).

³⁵⁸ Ibid, p 5.

³⁵⁹ Ibid, p 33.

³⁶⁰ Ibid, p 34.

³⁶¹ Ibid, p 35.

There have also been development on the legal front, the Work and Pensions Committee is appointed by the House of Commons for overseeing expenditure, administration and policy for the Department of Work and Pensions.³⁶² The draft Bill put forward by this committee aims to identify and eliminate the loopholes that allows companies to utilize ‘self-employment’ status for cheap labour and for tax benefits.³⁶³ This Bill builds on the Taylor Review and takes into account looks the recommendations made by the Taylor Review.³⁶⁴ As such, the Bill proposes legal reform in line with this Review,³⁶⁵ and it’s acknowledged that the growth of the gig economy and intermediary platforms has brought change in the way people work. In this regard, the Taylor Report states that this has led to greater flexibility for consumers and workers, and the suggestion is that this flexibility be maintained, but it should benefit both the worker and the company.³⁶⁶

The Taylor Review suggests, firstly, that there should be a ‘worker by default’ mode for companies of a certain size to prove that working conditions are true self-employment as companies are easily able to draft contracts stating that workers are independent contractors and it is then left for these workers to challenge these contracts.³⁶⁷ Therefore the worker by default is suggested.³⁶⁸ Secondly, as some rights are only available to those employees who have completed a minimum amount of service and as such some workers such as casual workers are not able to gain the same status, the proposal is that there should be an extension of time before service is broken and, more specifically, in the UK, it should increase from one week to one month.³⁶⁹ Thirdly, Employment Tribunals should implement higher fines and costs for employers who have in the past lost similar cases.³⁷⁰ The option of class actions for matters involving wages, status and working time should be considered, as opposed to

³⁶² House of Commons Work and Pensions and Business, Energy and Industrial Strategy Committees ‘A Framework for Modern Employment’ (2017-19).

³⁶³ *Ibid*, p 3-4.

³⁶⁴ *Ibid*.

³⁶⁵ *Ibid*, p 7.

³⁶⁶ *Ibid*, p 15.

³⁶⁷ *Ibid*, p 10.

³⁶⁸ *Ibid*.

³⁶⁹ *Ibid*, p 13.

³⁷⁰ *Ibid*, p 14.

individuals each bearing the risk.³⁷¹ This can benefit some vulnerable workers who do not know their rights.³⁷²

3.5 Recent case law developments in the UK

The UK courts have been called to deal with the controversy behind the status of Uber drivers and Deliveroo riders who both form part of the gig- economy. Further as noted above the UK is a member of the EU and therefore any European Court Judgment is binding. This section will provide a brief outline of these recent case law developments.

In the recent 2015 case of *Aslam v Uber*³⁷³, the drivers referred legal claims under the ERA read with the NMWA.³⁷⁴ Uber claimed that they were not ‘workers’ entitled to rights they claimed.³⁷⁵ Uber UK’s terms states that Uber UK acts as an intermediary between the driver and passenger.³⁷⁶ Uber BV says that it does not provide a transportation service but it is a platform which offers information and is a tool to connect customers seeking drivers.³⁷⁷ Uber BV also indemnifies itself from any liability that may occur.³⁷⁸ Uber supplies a list of car models which is acceptable.³⁷⁹ The driver is responsible for all costs and maintenance.³⁸⁰ Drivers who decline three trips in a row are forcibly logged of the app for ten minutes.³⁸¹ It has been stated that Uber has no control over the destination, however, the smartphone has a built in GPS.³⁸² The rating system also applies. If a rating is below 4.4 drivers are removed from the app.³⁸³ Uber further claimed that it merely provides persons with job opportunities and does not have jobs within their organisations.³⁸⁴ Uber claimed that drivers are not under an obligation to switch on the app or log on to it.³⁸⁵

³⁷¹ Ibid, p 15.

³⁷² Ibid.

³⁷³ *Aslam and ors v Uber BV and ors* Case 2202551/2015.

³⁷⁴ Ibid at para 7.

³⁷⁵ Ibid at para 8.

³⁷⁶ Ibid at para 28.

³⁷⁷ Ibid at para 33.

³⁷⁸ Ibid.

³⁷⁹ Ibid at para 44.

³⁸⁰ Ibid at para 45.

³⁸¹ Ibid at para 52.

³⁸² Ibid at para 54.

³⁸³ Ibid at para 55.

³⁸⁴ Ibid at para 68.

³⁸⁵ Ibid at para 85.

The Employment Tribunal (ET) referred to the actual nature of the contract.³⁸⁶ The ET applied the principle that the label attached to the working relationship is not determinative.³⁸⁷ Based on the facts that Uber appoints its drivers; does not disclose information about the passenger to the driver; Uber requires drivers to accept trips and cancellation may result in them being excluded from the app; Uber sets the route; Uber fixes the rates and Uber controls performance by way of a rating system, the ET held that the drivers were ‘workers’ as opposed to being independent contractors.³⁸⁸ It has also been suggested that due to this, Uber may need to restructure its business model.³⁸⁹

This case subsequently went on appeal to the Employment Appeal Tribunal (EAT).³⁹⁰ Uber BV, Uber London Ltd (ULL) and Uber Britannia Ltd were parties to the case. The EAT refers to them all as Uber, the ET held that the drivers were workers of ULL supplied by Uber BV.³⁹¹ Of paramount importance to the UK is that it is specifically stated by Uber that ‘a driver may not be replaced by a substitute’ (as discussed above a worker status in the UK is specifically dependent in the fact that there can be no substitution.)³⁹² The EAT also noted that according to Ubers case, if Uber was to become insolvent then the passenger is liable to the driver, the court noted the absurdity of this and also noted that the passenger and driver are in no position to negotiate any terms as they do not know each other and by the time they meet is after the ride has been accepted by both of them.³⁹³ The argument was that the contract was not with ULL but was with Ube BV. The EAT found that ULLs function was to hold the licences; meet the requirements for the licence; to deal with complaints and to handle the bookings.³⁹⁴ The questions the EAT had to consider was whether there was a contract between the drivers and ULL (the operator license holder) and whether the drivers provided services to ULL or whether ULL was merely an agent of Uber BV.³⁹⁵ The EAT had held that the absence of a contract between ULL and the drivers did not

³⁸⁶ Ibid at para 76.

³⁸⁷ Hester Jewitt ‘Uber drivers have been ruled to be “workers” not self-employed contractors’ New Law Journal (2016), p 1.

³⁸⁸ Ibid, p 2.

³⁸⁹ Ibid.

³⁹⁰ *Uber BV, Uber London Ltd, Uber Britannia Ltd v Aslam & Others* UKEAT/0056/17/DA.

³⁹¹ Ibid, at para 4.

³⁹² Ibid, at para 11.

³⁹³ Ibid, at para 69.

³⁹⁴ Ibid, at para 80.

³⁹⁵ Ibid, at para 91.

mean that there was no agency relationship.³⁹⁶ The EAT held that regard must be given to the realities of the situation and bargaining powers of the parties must be taken into account.³⁹⁷ In a commercial context the normal starting point is to look at the contract which is generally the end point.³⁹⁸ However, the court held that in this context the reality of the relationship must be looked at.³⁹⁹ The EAT held that the ET did not err in its decision⁴⁰⁰ and dismissed Ubers appeal.⁴⁰¹

Despite this decision by the EAT, the Central Arbitration Committee (CAC) shortly thereafter, in the case of *Independent Workers' Union of Great Britain(IWGB) v RooFoods Limited T/A Deliveroo*⁴⁰² (Deliveroo) , found against workers providing a delivery service to Deliveroo, an online food delivering company which is based in London.⁴⁰³ In this case, IWGB wanted recognition for collective bargaining purposes.⁴⁰⁴ Deliveroo opposed their application on the grounds that its drivers were not workers.⁴⁰⁵ Deliveroo employed 4500 workers.⁴⁰⁶ More than 50% of them wanted union recognition.⁴⁰⁷ Deliveroo delivers food from restaurants to its customers and the drivers collect the food on their motorbikes /bicycles.⁴⁰⁸ They work according to a 'zone' and collect food only in that particular zone.⁴⁰⁹

Deliveroo stated that it did not accept that the drivers were workers for the purpose of Trade Union and Labour Relations (Consolidation) Act 1992 (the Act) (s 296 -12).⁴¹⁰ Deliveroo was founded in 2013 and has operations in approximately 150 cities worldwide.⁴¹¹ Deliveroo allows persons to join via its website.⁴¹² They say that their riders are 'the blood of their company and they would not exist without them'.⁴¹³ The riders fill in an application form and are then contacted telephonically for an

³⁹⁶ Ibid, at para 83.

³⁹⁷ Ibid, at para 99.

³⁹⁸ Ibid, at para 105.

³⁹⁹ Ibid.

⁴⁰⁰ Ibid, at para 116.

⁴⁰¹ Ibid, at para 127.

⁴⁰² TUR1/985(2016).

⁴⁰³ 'Deliveroo' <https://en.wikipedia.org/wiki/Deliveroo>, accessed 31 January 2018.

⁴⁰⁴ TUR1/985(2016), at para 1.

⁴⁰⁵ Ibid, at para 4.

⁴⁰⁶ Ibid, at para 6.

⁴⁰⁷ Ibid.

⁴⁰⁸ Ibid, at para 7.

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid, at para 11.

⁴¹¹ Ibid, at para 34.

⁴¹² Ibid, at para 39.

⁴¹³ Ibid, at para 42.

interview.⁴¹⁴ Once they pass the telephonic assessment they must attend a trial session and their bicycles are assessed.⁴¹⁵ They also complete an online training course.⁴¹⁶ Criminal record checks are completed.⁴¹⁷ The riders must then pay for thermal bags.⁴¹⁸ Their contract stipulated that they can work for other companies and competitors and they do not need to wear branded clothing.⁴¹⁹ They are allowed to accept or reject work.⁴²⁰ There is also the option for substitution in their contracts.⁴²¹ However, it was noted that there is no real need for substitution and, if they are unavailable, they are under no obligation to accept the work.⁴²²

The CAC held that the true relationship must be looked at.⁴²³ It was noted that Deliveroo claims that riders have a great deal of flexibility, however, a question that seemed to be of concern to the CAC was why Deliveroo would spend so much time training riders but then allow for substitution.⁴²⁴ It was shown that some riders exercise this option of substitution.⁴²⁵ The CAC found that since the riders are allowed to substitute, they were not ‘workers’ of Deliveroo and the case was dismissed.⁴²⁶

The following case, *Asociación Profesional Élite Taxi v Uber Systems Spain SL*,⁴²⁷ made its way to the ECJ and is therefore authority in the UK. In 2014, the Asociación Profesional Elite Taxi (‘Elite Taxi’) representing taxi drivers in Barcelona brought an action against Uber SL for engaging in unfair competition against Elite taxi drivers.⁴²⁸ During this time, the Advocate General of the ECJ, proposed that the ECJ recognise Uber as a ‘transportation service’.⁴²⁹ The advocate general’s report is not binding on this court but it is a mere independent proposal to the court as a legal

⁴¹⁴ Ibid, at para 43.

⁴¹⁵ Ibid, at para 44.

⁴¹⁶ Ibid, at para 46.

⁴¹⁷ Ibid, at para 48.

⁴¹⁸ Ibid, at para 49.

⁴¹⁹ Ibid, at para 55.

⁴²⁰ Ibid, at para 56.

⁴²¹ Ibid, at para 59.

⁴²² Ibid, at para 76.

⁴²³ Ibid, at para 94.

⁴²⁴ Ibid, at para 98.

⁴²⁵ Ibid, at para 100.

⁴²⁶ Ibid, at para 104-105.

⁴²⁷ *Asociación Profesional Élite Taxi v Uber Systems Spain SL*, JUDGMENT OF THE COURT (Grand Chamber), (2017).

⁴²⁸ Court of Justice of the European Union: Press Release No 50/17: Advocate General’s Opinion in Case C-434/15- *Asociación Profesional Elite Taxi v Uber Systems Spain, SL*, p 1.

⁴²⁹ Ibid, p 2.

solution to cases which they are assigned to.⁴³⁰ According to the report, it was stated that drivers who work on the Uber platform do not do so independent of the platform because of the following factors:⁴³¹

“Uber (i) imposes conditions which drivers must fulfil in order to take up and pursue the activity; (ii) financially rewards drivers who accumulate a large number of trips and informs them of where and when they can rely on there being a high volume of trips and/or advantageous fares (which enables Uber to tailor its supply to fluctuations in demand without exerting any formal constraints over drivers); (iii) exerts control, albeit indirect, over the quality of drivers’ work, which may even result in the exclusion of drivers from the platform; and (iv) effectively determines the price of the service”.⁴³²

Due to these factors. Uber cannot be regarded as a mere intermediary according to this report.

In terms of the EU law of directive 98/34, a ‘service’ is defined as ‘any service provided for remuneration at a distance, electronic means at the request of a recipient of service’.⁴³³ In terms of Spanish law, urban taxi services must have a licence.⁴³⁴ Elite Taxi, therefore, sought a declaration that Uber Spain infringed this particular law and participated in unfair competition.⁴³⁵ The ECJ found it necessary to first determine whether the company should be regarded as a ‘transportation service’, an ‘information service’ or a combination or both.⁴³⁶ The court concluded that Uber provided an application(app) and without such application drivers making use of the Uber app would not be able to provide the transport service.⁴³⁷ Furthermore, without the app, persons who wished to make a trip would not do so with those drivers.⁴³⁸ Moreover, it was found that Uber determines the fare, exercises a certain amount of control and

⁴³⁰ Ibid, p 3.

⁴³¹ Ibid, p 2.

⁴³² Ibid.

⁴³³ *Asociación Profesional Élite Taxi v Uber Systems Spain SL*, JUDGMENT OF THE COURT (Grand Chamber), (2017), at para 3.

⁴³⁴ Ibid, at para 12.

⁴³⁵ Ibid, at para 13.

⁴³⁶ Ibid, at para 15.

⁴³⁷ Ibid, at para 39.

⁴³⁸ Ibid.

determines when to exclude the driver.⁴³⁹ The ECJ, therefore, held that the intermediation service (Uber) is an integral component of the overall service and should not be labelled as an ‘information society service’ but rather as a ‘service in the field of transport’.⁴⁴⁰

3.6 Conclusion

‘Worker’ as a separate legal category does not exist in South Africa. Our distinction is limited to the categories of ‘employee’ (enabling one to receive all employment rights) and ‘independent contractor’ leaving such person without any employment rights. This dissertation argues that adopting a similar approach should be considered in South Africa as granting workers who find themselves on the border line between the two distinct categories can prove to be beneficial. However, this category should not be used as a means to disguise employment. The UK policy recommendations discussed above could also prove beneficial to South Africa and law-makers should take more cognisance of persons working in the gig-economy. Fair labour practices should be extended to this group of workers as this gig economy is most likely to grow exponentially in the near future.

The decision taken by the UK EAT, that Uber drivers were workers of ULL was based on the realities of the relationship between the parties. The EAT looked beyond the fact that there was no contract between ULL and the drivers and granted the drivers ‘worker’ status. This ruling differs considerably from the most recent Labour Court Judgment in South Africa, whereby the LC based its decision that Uber drivers were not employees of Uber SA on the basis that Uber SA does not conclude contracts with the drivers but rather Uber BV is the entity that enters into the contracts with the drivers. Perhaps the LC should have further taken into account the unequal bargaining position between Uber SA and the drivers as although Uber SA did not enter into the contracts with the drivers there was a considerable amount of control exercised by Uber SA, in that the training of the drivers is done locally and the drivers direct any concerns they may have to Uber SA as opposed to Uber BV, and in addition they are paid in local currency and negotiate with Uber SA for reactivation in the event

⁴³⁹ Ibid.

⁴⁴⁰ Ibid, at para 40.

that they are deactivated.⁴⁴¹ It is due to this unequal bargaining position that this dissertation argues that there should be a degree of regulation granted to Uber drivers and therefore the next section discusses the extent to which protections should be granted to the Uber relationship.

⁴⁴¹ See discussion in chap 2 on *Uber South Africa Technology Service Pty (Ltd) v NUPSAW & Others* (C449/17) [2018] ZALCCT 1, at para 35-44.

CHAPTER 4: The Difficulties in classification and the extent to which protections that should be provided to Uber drivers

The LRA expressly excludes independent contractors from its scope of protection and since Uber drivers purportedly enter into commercial contracts with Uber BV, the consequences of exclusion are acutely felt by those who work under conditions akin to employment. In the absence of regulation, it has been left to the courts, both in South Africa and elsewhere, to determine whether drivers qualify for labour protection in cases where legal principles pertaining to status determination have been applied to those who provide labour in the gig-economy.

Given the nuances of the gig-economy, the issue this chapter seeks to address is whether it is apposite for Parliament to consider regulating ride-hailing industries that operate within the gig-economy by either extending labour protections to qualifying drivers or to adopt a *sui generis* form of (labour) regulation. This chapter will, therefore, focus on the difficulties introduced by the gig-economy ride-hailing industry, specifically as it pertains to the determination of status. Thereafter, the discussion will analyse the various proposed forms of regulation; and then finally, this chapter will discuss the labour law benefits in extending protection to Uber drivers in South Africa.

4.1 Difficulties in classification

It has been noted by certain authors that technological advances have led to ‘grey’ areas of employment that makes it difficult to distinguish between the genuine self-independent contractor and employee category in that the nature of platform work is disguised by using words such as rides, tasks and, gigs, in addition to the misleading classification of workers in these platforms as independent contractors.⁴⁴² Even though technology has changed, the work being done via technological platforms are done by humans and under the control of other humans.⁴⁴³ The uncertainty which Uber drivers are faced with is indeed problematic. In an ILO survey it was recorded that workers on the gig platform spend about 18 minutes every hour looking for work having to monitor their phones.⁴⁴⁴ It is suggested that factors such as ‘lack of protection, causal

⁴⁴² Jeremias Prassl and Martin Risak ‘*Uber, TaskRabbit & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*’, forthcoming comparative law and policy journal, p 4.

⁴⁴³ Ibid.

⁴⁴⁴ Valerio De Stefano ‘*Labour is Not a Technology- Reasserting the Declaration of Philadelphia in Times of Platform Work and Gig-Economy*’ IUSLabour (2/2017), p 9.

nature of the job and degree of control exercised' are strong indicators that this type of work should be regulated.⁴⁴⁵ Before addressing the question of regulation, it is necessary to consider the question of whether the binary distinction between an employee and independent contractor (as applied in South African law) can still be maintained in today's world of work, and more specifically in the gig-economy.⁴⁴⁶

Prassl, et al are of the opinion that the gig economy does not simply encompass a binary relationship and that there is in actual fact three parties being the 'crowdsourcer' (the customers), the 'platform' (for example, Uber BV) and the 'crowdworker' (the workers who provide the service on the platforms).⁴⁴⁷ The relationship between the crowdsourcer and the crowdworker will in all probability, it is argued, be regarded as an independent contractor relationship as upon completion of the task the job comes to an end.⁴⁴⁸ In addition, the crowdworker does not meet the organisational test with regards to the crowdsourcer and there is lack of economic dependence on the crowdsourcer.⁴⁴⁹ However, as it pertains to the relationship between the crowdworker and platform, there is usually some contract in place as once there is an agreement to do the work, the terms and regulations of the platform needs to be adhered to.⁴⁵⁰ The crowdworker must build up a reputation by receiving good ratings.⁴⁵¹ If it can be shown that the work is for the platform, rather than for the crowdsourcer, then there could indeed be an employment relationship.⁴⁵²

In this regard, Prassl et al consider a third relationship being one that exists between the crowdsourcer and the platform in that if there is any relationship here it will merely be a broker and in all likelihood will be a contract of service.⁴⁵³ There are five criteria which these authors have identified in determining whether Uber drivers should be recognised as 'independent contractors' or 'employees'.⁴⁵⁴ These five

⁴⁴⁵ Berg, J.; De Stefano, V. "It's time to regulate the gig economy", in Sheffield Political Economy Research Institute (SPERI) Blog (18 April), 2017.

⁴⁴⁶ Guy Davidov 'The Status of Uber Drivers: A Purposive Approach' (2017), p 3.

⁴⁴⁷ Jeremias Prassl and Martin Risak 'Uber, TaskRabbit & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork', forthcoming comparative law and policy journal, p 9.

⁴⁴⁸ Ibid, p 11.

⁴⁴⁹ Ibid.

⁴⁵⁰ Ibid, p 12.

⁴⁵¹ Ibid.

⁴⁵² Ibid, p 13.

⁴⁵³ Ibid, p 14.

⁴⁵⁴ Ibid, p 16.

criteria are discussed immediately below with specific reference to the Uber platform (that is, Uber BV):

1. *Inception and termination of employment relationship*: Whilst the relationship between the customer and the driver ends upon reaching the destination, the relationship with regards to the platform and the worker continues.⁴⁵⁵ The platform controls the relationship in that the cars are checked, relevant insurance is required and termination is ultimately the choice of Uber (BV).⁴⁵⁶ A ground for termination may be based on poor ratings and the possibility for reactivation may involve the driver undertaking another training course.⁴⁵⁷ Clients do not exercise this kind of control because they do not know who their drivers will be.⁴⁵⁸ On some apps, drivers are able to see passenger's average ratings and in this way can avoid dealing with 'difficult customers'.⁴⁵⁹ However, even this choice is limited since drivers need to maintain an 80% acceptance rate and may be less inclined to reject requests either based on client preference or destination preference.⁴⁶⁰
2. *Receiving labour and the fruits of that labour*: Uber is the direct recipient of the payment which is taken directly from the customer by Uber.⁴⁶¹ The aim being to avoid direct transactions with the driver.⁴⁶² Drivers are, therefore, not paid directly by the customer but by Uber.
3. *Providing work and pay*: In order to do the work and to receive payment, the driver needs a smart phone.⁴⁶³
4. *Managing the enterprise's internal market*: Uber exercises control over how the ride is provided by determining the route to be taken,⁴⁶⁴ the type of cars to be driven and sometimes the music that must be played.⁴⁶⁵ Customers and drivers may both rate each other.⁴⁶⁶

⁴⁵⁵ Ibid, p 19.

⁴⁵⁶ Ibid.

⁴⁵⁷ Ibid.

⁴⁵⁸ Ibid.

⁴⁵⁹ Ibid.

⁴⁶⁰ Ibid, p 20.

⁴⁶¹ Ibid.

⁴⁶² Ibid.

⁴⁶³ Ibid.

⁴⁶⁴ Ibid.

⁴⁶⁵ Ibid, p 21.

⁴⁶⁶ Ibid.

5. *Managing the enterprise external market*: Uber undertakes the return on profit as well as potential losses.⁴⁶⁷

When these five criteria are specifically applied, the relationship between Uber BV and the drivers is no different from a ‘unitary’ employer relationship.⁴⁶⁸ This relationship should, therefore, be regulated in the different jurisdictions where Uber operates and there should be allowance for labour law rights (such as unfair dismissal).⁴⁶⁹ However, since there are multiple parties involved in this arrangement, these authors suggest that all this should be taken into account when regulating the relationship.⁴⁷⁰ In this respect, it is proposed that a rigid definition of the ‘employer’ needs to change to a more flexible definition such as the following:⁴⁷¹

“The entity, or combination of entities, playing a decisive role in the exercise of relational employing functions, and regulated or controlled as such in each particular domain of employment law.”⁴⁷²

Prassl et al, therefore, argue for a ‘functional’ definition. That is, instead of looking at the absence or presence of particular factors, the exercise of specific functions must be discerned and this determination would include considering whether a decisive role is played, which according to the authors is ‘as relevant as the actual exercise thereof’.⁴⁷³ In practice, this could lead to multiple employers in an employment situation with the result that different responsibilities are attached to different functions.⁴⁷⁴

The ‘functional’ definition is an instructive response to the lack of regulation leading to ‘digital slaves working away in their virtual sweatshops’.⁴⁷⁵ Adopting such an approach in the gig-economy may prove to be beneficial as it takes into account the entity (or entities) that play a decisive role. The Uber platform does involve more than two parties and, therefore, the assessment of the extent of the specific functions of

⁴⁶⁷ Ibid.

⁴⁶⁸ Ibid, p 22.

⁴⁶⁹ Ibid.

⁴⁷⁰ Ibid.

⁴⁷¹ Ibid, p 26.

⁴⁷² Ibid.

⁴⁷³ Ibid, p 27.

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid, p 8.

each parties may prove to be more beneficial in determining the employment rights of drivers and the party against whom such rights should be exercised against.

4.2 A third category?

To find a balance between the main categories (that is, employee and independent contractor), Harris, et al suggests a third category between workers who have characteristics of both independent contractors and employees in the online gig economy.⁴⁷⁶ These workers can choose when and where to work,⁴⁷⁷ and they have the liberty to work more than one job.⁴⁷⁸ The author classifies these persons as ‘independent workers’, as opposed to ‘independent contractors’, and are persons who are in a weaker bargaining position, therefore, unable to negotiate contracts with intermediaries (such as Uber) in order to receive employment.⁴⁷⁹ It is suggested that collective bargaining rights be granted to these workers.⁴⁸⁰ However, there are drawbacks to this classification primarily in respect of a worker who performs work on multiple platforms simultaneously. In this case, it may be difficult to identify the employer.⁴⁸¹

A third category might be useful in that workers who ‘share some of the characteristics as employees’ can be brought within the umbrella of protections by allowing them specific labour law rights.⁴⁸² It is suggested that when dealing with these new work arrangements, the question should not be whether these arrangements are similar to traditional employment but, instead, whether these arrangements are the kind that requires the application of labour laws.⁴⁸³ In this regard, Davidov discusses the need for labour laws to advance equality, workplace democracy, distributive justice, autonomy, efficiency, non-domination, and maximizing capabilities.⁴⁸⁴ He, furthermore, refers to vulnerabilities as subordination and dependency and if the Uber

⁴⁷⁶ Seth D. Harris and Alan B. Krueger ‘*A Proposal for Modernizing Labour Laws for Twenty-First-Century Work: “The Independent Worker”*’, Discussion Paper (2015-10) at 4.

⁴⁷⁷ Ibid.

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid, p 10.

⁴⁸⁰ Ibid, p 17; 27.

⁴⁸¹ Eisenbrey R. and Mishel L. (2016), “*Uber Business Model Does Not Justify a New ‘Independent Worker’ Category*”

⁴⁸² Guy Davidov ‘*The Status of Uber Drivers: A Purposive Approach*’ (2017), p 4.

⁴⁸³ Ibid, p 6; The author says that new forms of work are constantly appearing and that discretion of the courts is needed and that a purposive interpretation (an interpretation that best advances legislation) of ‘employee’ is needed with new forms of work the suitability of current legislation may need to be reviewed 5- 6).

⁴⁸⁴ Ibid. See for example on p 7- ...p 12.

driver, for instance, is rendered ‘vulnerable’ because of his subordination or dependency on the Uber platform, this ought to trigger at least a degree of labour law protection.⁴⁸⁵ Some drivers may be taking on this work as a part time job whilst performing many similar such part times jobs.⁴⁸⁶ According to our traditional common law tests, these drivers would fail to meet the economic dependency tests.⁴⁸⁷ However, Davidov proposes a broader understanding of the notion of ‘economic dependency’ to include ‘the fulfilment of social and economic needs’ with the aim of extending the scope of labour protection offered to drivers who are heavily dependent on the platform to meet these needs.⁴⁸⁸ Drivers who are in fact economically dependent, notwithstanding their subordinancy to the platform,⁴⁸⁹ should be granted a limited degree of labour laws (such as collective bargaining rights).⁴⁹⁰ Bearing in mind that the traditional reason for excluding independent contractors from labour law protections is based on the assumption that, unlike certain employees, they are not in need of the these protections, it is therefore crucial to be guided by the purpose of labour law when determining whether a driver is truly an independent contractor or not.

In the UK, certain labour protections have been extended to groups of workers who fall within an intermediate category namely the ‘dependent contractor’ (the worker category as discussed in the previous chapter). However, it has been noted that there are certain risks that exist in introducing this new category of workers.⁴⁹¹ Whilst legally entitled to the national minimum wage and annual leave, as well as protection against discrimination, a ‘worker’ is not afforded protection against unfair dismissal, redundancy pay and cannot request flexible working arrangements.⁴⁹² This category is particularly problematic as it allows for the possibility of disguised employment and effectively denying these ‘workers’ the full complement of labour rights. The selective

⁴⁸⁵ Ibid.

⁴⁸⁶ Ibid, p 10.

⁴⁸⁷ Ibid.

⁴⁸⁸ Ibid, p 7.

⁴⁸⁹ Eisenbrey R. and Mishel L. (2016), “*Uber Business Model Does Not Justify a New ‘Independent Worker’ Category*”. There is a measurable amount of control and rejecting Uber rides can lead to deactivation. Acceptance rates must be as high as 80 %. Factors which courts can take into account are how long do the drivers have to respond to requests; how often do they need to accept requests; and what happens if they decline requests.

⁴⁹⁰ Guy Davidov ‘*The Status of Uber Drivers: A Purposive Approach*’ (2017), p 8.

⁴⁹¹ Valerio De Stefano ‘*The Rise of the “Just in Time Workforce”: On-Demand Work , Crowd Work and Labour Protection in the Gig- Economy,*” p 14.

⁴⁹² Ibid, p 31.

application of labour rights in this manner goes against one of the core principles of the ILO, that is, the rights of workers (broadly defined) to freedom of association and the right to collective bargaining as found in the *ILO Declaration on Fundamental Principles and Rights at Work* (1998).⁴⁹³ In this regard, De Stefano posits that introducing this intermediate category is not going to be good enough and that the way forward is to fully recognise jobs in the gig economy as work.⁴⁹⁴ He further states that the gig economy should not be viewed as a separate category in the labour market but should rather be viewed, in light of the similarities shared with other forms of non-standard employment. This will help to include gig economy workers in strategies aimed at improving non-standard employment generally with a focus on entitlements to minimum wage; collective bargaining and social security contributions.⁴⁹⁵

Further to De Stefano's point that gig-workers are akin to non-standard employees, he argues that certain work on-demand work conducted on the gig platform resembles a form of 'casual work'.⁴⁹⁶ Therefore, platform workers, such as Uber drivers should be included in legislative attempts to improve the working conditions of casual workers.⁴⁹⁷ In this regard, Berg et al note the following:

"Rather than a new breed of self-employed workers who are "their own bosses" and work how they want, choosing their own schedule [...] it would be more correct to look at the vast bulk of platform workers as "twenty-first century casual work rebranded."⁴⁹⁸

In this instance casual work may be disguised as self-employment for the vast number of workers on the Uber platform.

It is suggested that the same technology that brings about this work can be used as a platform to regulate this work.⁴⁹⁹ For instance, technology can be used to monitor the amount of hours the workers are working and specifically with Uber having the app on can track the drivers' whereabouts.⁵⁰⁰ Workers can also agree collectively on

⁴⁹³ Ibid, p 15.

⁴⁹⁴ Ibid, p 33.

⁴⁹⁵ Ibid, p 33-34.

⁴⁹⁶ Ibid, p 13.

⁴⁹⁷ Ibid.

⁴⁹⁸ Berg, J.; De Stefano, V. "It's time to regulate the gig economy", in Sheffield Political Economy Research Institute (SPERI) Blog (18 April), 2017.

⁴⁹⁹ Ibid.

⁵⁰⁰ Ibid.

the platform on issues regarding wages and the platform can also be used for the payment of social contributions.⁵⁰¹

Workers in the Uber platform are in a weaker position as they are unable to negotiate their rights and, as such, are dependent on the platform as they are in a subordinate position. Thus granting them protections, taking into account the extent of the different relationships formed via these platforms, is necessary. Disguised employment via technology needs to be acknowledged and needs to be eliminated. This same technology that is used to control workers can be used to benefit workers by providing them with a platform to negotiate their wages and for social rights to be effected via these platforms.

The following section will discuss whether Uber drivers should be recognised as ‘employees’ in the South African context.

4.3 Should Uber drivers be legally recognised as ‘employees’ of Uber for the purposes of South African labour legislation?

Notwithstanding the difficulties presented by classifying Uber drivers, there is a growing consensus that the Uber arrangement should be regulated and, in this regard, the debates centre on the extent of this regulation.⁵⁰² The primary question relates to the manner in which the Uber arrangement should be regulated by simply classifying drivers as ‘employees’ and, likewise, the Uber platform as the sole employer. It has been suggested by Valerio that some protections should be granted regardless of the employment status which ought to be in line with the ILO’s fundamental principle that ‘labour is not a commodity’.⁵⁰³ These rights would include those encapsulated in the ILO’s four fundamental principles (that is, no worker should be denied access to basic human rights such as freedom of association and the right to collective bargaining, freedom from forced and child labour and the right not to be discriminated).⁵⁰⁴ For

⁵⁰¹ Ibid.

⁵⁰² For example Valerio article of the “*The Rise of the “Just in Time Workforce”: On-Demand Work, Crowd Work and Labour Protection in the Gig-Economy.*” Davidov on adopting a purposive approach.

⁵⁰³ Valerio De Stefano ‘*Labour is Not a Technology- Reasserting the Declaration of Philadelphia in Times of Platform Work and Gig-Economy*’ IUSLabour (2/2017), p 12.

⁵⁰⁴ Ibid, p 35.

example, in cities such as Seattle, USA, such a regulatory approach was adopted in the form of a Bill which allows workers on ride hailing apps to join trade unions.⁵⁰⁵

Joining a trade union is pivotal as drivers are both represented and informed of their legal rights, and granted a voice and say in the manner in which the future of the gig economy is to be construed.⁵⁰⁶ It has also been suggested that independent contractors should be allowed to join organisations, such as co-operatives and associations, that carry the same role as trade unions and that their rights should be equally protected the same way that workers' rights are protected by joining a trade union.⁵⁰⁷ However, this proposal comes with problems as these organisation may be faced with the same challenges presently faced by trade unions particularly when it comes to organising non-standard workers.⁵⁰⁸ In order to organise effectively, trade unions would, therefore, need to be more informed.⁵⁰⁹ Theron, albeit in a different context, suggests that more statistical data is needed in this regard.⁵¹⁰ Similarly, the collection of data in the gig economy will go far in determining the type and extent of regulation as it applies to the Uber arrangement.

4.4 Specific protections in terms of South African labour law

One of the main disadvantages to Uber drivers is that labour and social security rights are not afforded to them. Despite the fact that they are afforded certain benefits that come with being an independent contractor such as flexibility, and the ability to take on more than one job, they are still particularly susceptible to exploitation. In the following section, an examination of the specific rights will be discussed assuming they were to be recognised as employees in terms of South African labour law.

4.4.1 Individual and collective labour rights

In terms of s 4 and s5 of the LRA employees are entitled to join a trade union and to participate in activities and programmes of a trade union and to strike. In the

⁵⁰⁵ Valerio De Stefano *'The Rise of the "Just in Time Workforce" : On-Demand Work , Crowd Work and Labour Protection in the Gig- Economy,'* p 36.

⁵⁰⁶ Ibid.

⁵⁰⁷ Jan Theron *'Non-Standard Employment and Labour Legislation: The Outlines of a Strategy'* Monograph (1/2014), p 13.

⁵⁰⁸ Ibid; Theron discusses how trade unions primary focus is to give workers a 'permanent' status and how it is not viable in other certain non-standard forms of employment, an experimental approach is suggested.

⁵⁰⁹ Ibid, p 24.

⁵¹⁰ Ibid.

case of *SANDU*, the CC granted this right to permanent force members even though they were not recognised as employees.⁵¹¹ Thus, Uber drivers may still argue for these rights even though they are not automatically granted them.

One of the most crucial rights provided for in the LRA to employees is the right not to be unfairly dismissed and not to be subjected to unfair labour practices.⁵¹² These protections against unfair dismissal and unfair labour practices are not provided to Uber drivers by virtue of not being ‘employees.’⁵¹³

Even though nothing prevents independent contractors from protest action, in order for the protections in terms of s187 (1) of the LRA to apply (which states that it is automatically unfair for an employee to be dismissed for participating in strike or protest action), protests action must comply with the provisions of the LRA specifically Chapter IV which only guarantees ‘employees’ the right to strike. It seems that it would, therefore be impossible for Uber drivers to engage in a protected strike in accordance with the LRA.

The above rights are most pertinent to vulnerable employees in a position of dependency. Uber drivers dependent on the Uber platform for their livelihood are in need of these fundamental basic rights.

4.4.2 Statutory minimum terms and conditions of employment

As stated in Chapter 2, independent contractors are specifically excluded from the definition of ‘employee’ stipulated in terms of the BCEA.⁵¹⁴ The BCEA provides for the regulation of working time; ordinary hours of work; for overtime work; the stipulation of average hours of work; meal intervals; rest periods; pay for Sunday work; night work and public holidays.⁵¹⁵

Uber drivers are specifically susceptible to abuse as they have no similar law covering any of the above mentioned rights. Owing to the demands of working on a platform, where there is a demand for work after hours and during holiday periods, workers who are bound to work according to such conditions should be the bearer of

⁵¹¹ *SANDU v Minister of Defence* 1999 (6) BCLR 615 (CC).

⁵¹² Labour Relations Act, s 185.

⁵¹³ Du Toit et al *The Labour Relations Law: A Comprehensive Guide*, 6-ed, (2015), LexisNexis, South Africa, p542.

⁵¹⁴ Basic Conditions of Employment Act 75 of 1997, s 1.

⁵¹⁵ Ibid, chap 2.

these basic employment rights. The BCEA further stipulates rates for overtime work.⁵¹⁶ Rest periods are crucial to Uber drivers for the safety of both the driver and the passenger and there is no current law regulating this. Drivers often find themselves working for long periods on the roads.

The BCEA ensures that health and safety measures are in place for workers working during night shifts.⁵¹⁷ It may very well be the case that Uber drivers work both night and day shifts without any regulation or regard be given to their health and safety. The Code of Good Practice on the Arrangement of Working Time provides that employers should provide health assessments and counselling for employees who work night shifts⁵¹⁸ and further stipulates that assessments should include any difficulties employees may be experiencing with nights shifts; health problems; psychological, emotional and social stress; insomnia and sleep deprivation ; diet such as sleeping pills.⁵¹⁹ There is also the provision of education regarding health risks associated with employees work schedules.⁵²⁰ It is suggested that these basic rights be granted to Uber drivers.

Independent contractors are deprived of sick leave, maternity and family responsibility leave and sit with no income during these times.⁵²¹ There are international legal instruments which suggest that there should be an extension of certain rights to persons working in non-conventional employment relationships, such as the Convention on Maternity Protection, 182 of 2000. South Africa has, however, not ratified this Convention which applies to all women, including those working in non-conventional forms of work.⁵²² If South Africa does ratify this Convention that would mean an extension of the rights in terms of the BCEA (such as maternity leave in terms of chap 3).⁵²³

South Africa should aim to extend the above basic conditions of employment to the category of Uber drivers as they are working in a particular platform where safety is of utmost importance and regulations with regards to rest periods are

⁵¹⁶ Ibid, s 10.

⁵¹⁷ Ibid, s 17.

⁵¹⁸ The Code of Good Practice on the Arrangement of Working Time, item 8.

⁵¹⁹ Ibid.

⁵²⁰ Ibid.

⁵²¹ Basic Conditions of Employment Act 75 of 1997, chap 3.

⁵²² Benjamin Paul 'An Accident of History: Who is (and Who Should Be) an Employee under South African Labour Law,' 25 Indus. L.J. (Juta) 787, 804 (2004), p 801.

⁵²³ Ibid.

paramount. Further the prevalence of some flexibility on the Uber platform should not mean that drivers should not be entitled to labour and social security rights, as work is a crucial aspect of one's life and this should not be compromised due to the fact that persons choose to rely on the gig-economy for their livelihood.

4.4.3 Equal treatment

Once again the provisions of the EEA are specifically intended for employees as well as applicants for employment.⁵²⁴ The purposes of this Act is to give effect to the constitutional right to equality,⁵²⁵ a principle deeply enshrined in our Constitution. Section 6 of the EEA prohibits unfair discrimination on listed and unlisted grounds.⁵²⁶ The right not to be unfairly discriminated against is a crucial right to Uber drivers.

The EEA makes provision for equal remuneration for men and women.⁵²⁷ The ILO Convention on Equal Remuneration⁵²⁸ stipulates that rates of remuneration must be established without discrimination based on sex.⁵²⁹ This is pertinent to Uber drivers in specific, as women in this category of work are underrepresented and such imbalance should not be overlooked.

Having regard to the history of our country, the right to equality as prescribed by the EEA is paramount and the provision of this right in the gig-economy needs to be institutionalized.

4.4.4 Health and safety

The Occupational Health and Safety Act 85 of 1993 is meant to provide for health and safety of persons at work. An employer must provide a working environment that is safe and does not jeopardize the health of employees.⁵³⁰ Employers must take steps to eliminate any harm or hazard⁵³¹, and inform, instruct, train and

⁵²⁴ Employment Equity Act 55 of 1998, s 9.

⁵²⁵ Constitution of the Republic of South Africa, 1996, s 2.

⁵²⁶ The definition of employment policy or practice as stipulated in s 1 of the EEA. S 6 states that discrimination direct or indirect against any employee in an employment policy or practice on the grounds of race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or any another arbitrary ground is prohibited. It should be noted that the interpretation of 'an employment practice or policy'.

⁵²⁷ For example the ILO convention of equal pay for work of equal value for men and women and code of good practice on equal pay for work of equal value.

⁵²⁸ Equal Remuneration Convention, 191 (No.100).

⁵²⁹ Ibid, article 1.

⁵³⁰ Occupational Health and Safety Act 85 of 1993, s 8.

⁵³¹ Occupational Health and Safety Act 85 of 1993, s 8.

supervise when necessary with regards to health and safety⁵³² as well as establish precautionary measures.⁵³³

Violent attacks on Uber drivers have come up numerously on the media. Rivalry between metered taxi drivers and Uber drivers have resulted in threats being made to Uber drivers who enter the territory of certain taxi drivers.⁵³⁴ For examples, a certain Uber driver was assaulted and his car torched.⁵³⁵ Another Uber driver was killed by an alleged hijack and speculations were drawn that the driver could have been killed by accepting a cash trip and as such other drivers were cautious of accepting cash trips.⁵³⁶ In another case, an Uber driver was also a victim of acid burning.⁵³⁷ Kgomotso Tiro had been attacked after transporting a cash client, and had complained that Uber is not doing enough to protect the safety of its drivers, and he further conveyed his grievance that Uber had not seen to him whilst he was in hospital.⁵³⁸ Uber attempted to put in place private security guards in certain areas.⁵³⁹ However, merely taking these steps does not combat the current situation which the ride hailing industry is currently facing in South Africa. These drivers should not have to fight for their basic right of safety to be granted to them just because they are classified as independent contractors.

As the situation currently stands, Uber incurs no liability whatsoever if any of their drivers are injured at work. In a recent acid burning attack on a driver, Uber had stated that the driver did not log onto the platform and therefore they were not responsible for any of the injuries occurred.⁵⁴⁰ As can be seen from news media reports, Uber drivers are particularly vulnerable to violence with rivalries and they should, therefore, be entitled to their very basic of rights.

⁵³² Ibid.

⁵³³ Ibid.

⁵³⁴ <https://www.dailymaverick.co.za/article/2016-07-15-uber-wars-brutal-attack-on-driver-sparks-mother-city-clash-between-meter-taxi-protesters-and-police/#.Wk6Y2IVOLVI>, accessed 04 January 2018.

⁵³⁵ Ibid.

⁵³⁶ Ibid.

⁵³⁷ <https://www.timeslive.co.za/news/south-africa/2017-08-23-uber-driver-killed-dumped-in-field-near-daveyton/>, accessed 4 January 2018.

⁵³⁸ <https://www.timeslive.co.za/news/south-africa/2017-08-22-uber-driver-blames-company-for-acid-attack/>

⁵³⁹ 'Being an Uber driver in South Africa can be lethal' <https://www.cnet.com/news/meet-ubers-private-security-firm-in-south-africa/>, accessed 4 January 2018.

⁵⁴⁰ E news, checkpoint, 14th November 2017.

There are many health risks associated with the gig-economy, for example, pressure to meet work targets,⁵⁴¹ working without breaks, and visual strain that could lead to headaches.⁵⁴² Some workers may be unaware or unable to afford eye tests and regular check-ups and the risk for this is fully transferred to the worker because of their employment status. These are factors which could potentially affect Uber drivers. There are also psychological risks that come with working on the gig platform as workers are faced with the uncertainty of whether or not they will have work the next day or even the next hour or if and when they will be paid (with Uber drivers if a customer cancels a trip or requests a refund or gives a bad rating these are all factors that affect the driver).⁵⁴³ The stress of receiving a bad rating since most of the work is dependent on this factor.⁵⁴⁴ Workers are at stress of quickly accepting a job online and at a short notice.⁵⁴⁵ Uber drivers may be accepting one ride after the next with no regulation of any break periods, this is clear example of placing the worker in a complete subordinate position.

Uber drivers have no protection when it comes to health and safety at work, and they are thus particularly vulnerable in this respect. Attacks have been made on them leaving them in unimaginable situations. As it currently stands, Uber takes no liability for any risk or harm inflicted upon these drivers whilst they are working. It is suggested that the provisions of the OHSA be extended to Uber drivers.

4.4.5 Unemployment benefits

The purposes of the UIA is to provide for unemployment insurance for employees who become unemployed and in certain instances for such employees' beneficiaries.⁵⁴⁶ An employee is entitled to unemployment insurance if there has been a termination of the employment contract, or if the reason for termination is as a result of insolvency.⁵⁴⁷ Employees are further entitled to benefits if they are unable to work due to illness.⁵⁴⁸ An employee who is pregnant is entitled to maternity benefits during

⁵⁴¹ European Agency for Safety and Health at Work 'A Review of The Future of Work: Online Labour Exchanges, Or Crowdsourcing: Implications For Occupational Safety and Health' (discussion paper), p 2.

⁵⁴² Ibid.

⁵⁴³ Ibid, p 3.

⁵⁴⁴ Ibid.

⁵⁴⁵ Ibid.

⁵⁴⁶ Unemployment Insurance Act 63, 2001, s 2.

⁵⁴⁷ Ibid, s 16.

⁵⁴⁸ Ibid, s 20.

the period of pregnancy and delivery and for the period thereafter⁵⁴⁹ as well as adoption benefits.⁵⁵⁰ Dependant benefits are also available to employees.⁵⁵¹

Independent contractors work according to the principle of ‘no work equals no pay’. If Uber drivers are sick and cannot perform their duties they are without income for that period. Furthermore, they are not given any maternity benefits or adoption benefits. This poses a great risk for those persons solely dependent on the gig economy for their only source of income and also poses a great risk for their dependants.

4.6 Conclusion

As can be seen from the above discussion, Uber drivers in their capacity as independent contractors are left without many protections. The Uber platform involves more than two parties and as such the exercise of specific functions within these relationships must be taken into account when considering the extent to which protections should be granted to Uber drivers. It is argued that a purposive and ‘functional’ approach should be taken. Regard must be given to the ILO fundamental principles such as freedom of association, the right to collective bargaining, freedom from forced and child labour and the right not to be discriminated upon. It is suggested that Uber drivers be granted these rights regardless of their employment status. Social and economic needs must be taken into account and certain social rights should be available to workers in the Uber platform. With the constant change in the manner work is being conducted, cognisance must be taken of the different working arrangements and the vulnerabilities attached to these arrangements and thus regulation must be effected.

⁵⁴⁹ Ibid, s 24.

⁵⁵⁰ Ibid, s 28.

⁵⁵¹ Ibid, s 31.

CHAPTER 5: Conclusion

The main question which this dissertation sought to address is whether South Africa should regulate the Uber relationship. Chapter one therefore provided a brief introduction into the gig-economy by analysing the concept of non-standard employment. In Chapter 2, an overview of the legal normative framework was provided. The aim of Chapter 3 was to provide a comparative analysis of the UK position as it pertains to the category of Uber drivers and specifically policy recommendations and suggestions as adopted in the UK. Chapter 4 considered to what extent labour law should protect workers on the Uber platform. The chapter will summarise the above discussion and will end by making a number of recommendation to better protect Uber drivers in South Africa.

5.1 The Gig- economy and Uber

Undoubtedly non-standard forms of employment are on the rise. The gig-economy is one such example of non-standard employment and Uber is an example of work conducted via the gig-economy. Whilst the emergence of the Uber platform has brought about opportunity for persons to engage in work it is suggested in the dissertation that it has also brought about a great deal of precariousness for those dependent on this platform for their livelihood. Therefore, it is necessary to consider the very purposes of labour law legislation and whether legislation as it currently stands is able to provide protections to persons who are in need of such protections, particularly in the context of Uber drivers.

5.2 The Normative Framework

The Constitution guarantees ‘everyone’ the right to fair labour practices.⁵⁵² However, certain laws only apply to ‘employees’ thus leaving Uber drivers outside the umbrella of protections. In view of the fact that they are seen as independent contractors, they are therefore without labour law and social security rights. South Africa is, however, a member state of the ILO and is therefore bound by ILO standards of promotion of decent work.⁵⁵³ Parliament has also been open to the changes in the workforce and as such enacted certain provisions such as the rebuttable presumption in terms of s200A of the LRA and the 2014 LRA amendment regulating certain

⁵⁵² The Constitution of South Africa, 1996, s 23.

⁵⁵³ <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm>

categories of non-standard employment.⁵⁵⁴ It is, furthermore suggested that lawmakers in South Africa consider regulating work in the gig-economy, similar to the position currently taken by lawmakers in the UK. At the present moment, it is left to the judiciary to determine the rights to be afforded to Uber drivers, as the recent 2017 Uber case demonstrates. This ad-hoc determination means that individuals need to approach the courts alleging employment status and this can be burdensome for some drivers. The question thus is whether regulation should be effected with regards to the Uber model. It was in this respect that the dissertation undertook a comparative study of the UK and highlighted policy recommendations made by a number of committees.

5.3 Employment Law, Policy Recommendations and Case law in the UK

In the UK there are three categories of workers that is an ‘employee,’ ‘independent contractor’ and the ‘worker’. The ‘worker’ category was analysed and it was suggested that perhaps South Africa could perhaps incorporate a similar category for persons who show characteristic of both an independent worker and an employee. The risks involved in incorporating this third category was also deliberated upon. Further, policy recommendations such as the Taylor Review, the draft Bill by Work and Pensions Committee and the Good gigs report was discussed. It was suggested that South Africa should adopt a similar approach and should show more cognisance to the change of work and that more statistical data and research is required. To be able to provide more support to this group of workers, it is necessary to understand the relationships on the Uber platform and the extent to which protections should be granted in the South African context.

5.4 The Difficulties in classification and the extent to which protections that should be provided to Uber drivers

The Uber platform involves multiple parties being the ‘customer’, the platform (Uber BV) and the ‘worker’ (being the driver).⁵⁵⁵ With regards to the relationship between the customer and the driver, it is argued that the relationship is indeed one of an independent contractor as once the ride comes to an end so does the relationship and therefore there lacks dependency.⁵⁵⁶ However, it was argued that with regards to

⁵⁵⁴ See my discussion in chap 2. Labour Relations Act, 1995, s 198.

⁵⁵⁵ Jeremias Prassl and Martin Risak ‘*Uber, TaskRabbit & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*’, forthcoming comparative law and policy journal, p 9.

⁵⁵⁶ Ibid, p 11.

the relationship between the driver and the platform there is indeed a relationship of subordinancy and dependency and as such there should be regulation.⁵⁵⁷ It was, therefore, suggested that a more ‘functional’ definition be adopted that does not look at the absence or presence of factors but is concerned with specific functions and whether a decisive role played.⁵⁵⁸ The question of whether full protection should be granted to Uber drivers was further deliberated and in this regard it was suggested that regardless of employment status, certain ILO fundamental rights should be granted such as , freedom of association and the right to collective bargaining, freedom from forced and child labour and the right not to be discriminated.⁵⁵⁹

5.6 The way forward?

There needs to be an acknowledgment that labour laws needs to move away from providing a greater deal of protection only to those working in standard employment. The world of work is changing and therefore lawmakers needs to be responsive to this change. Whilst technology may be used by companies as a means of disguising employment, the same technology can used to regulate employment by granting collective rights via these platforms and allowing for social security payment.⁵⁶⁰ Factors such as subordinancy and dependency call for these rights to be acknowledged.⁵⁶¹ It is therefore concluded that lawmakers in South Africa should do more to extend legal protections to Uber drivers in accordance with the spirit and purport of the Constitution and to give effect to our international obligations.

⁵⁵⁷ Ibid, p 13.

⁵⁵⁸ Ibid, p 17.

⁵⁵⁹ Valerio De Stefano ‘*Labour is Not a Technology- Reasserting the Declaration of Philadelphia in Times of Platform Work and Gig-Economy*’ IUSLabour (2/2017),p 35.

⁵⁶⁰ Berg, J.; De Stefano, V. “*It’s time to regulate the gig economy*”, in Sheffield Political Economy Research Institute (SPERI) Blog (18 April), 2017.

⁵⁶¹ Guy Davidov ‘*The Status of Uber Drivers: A Purposive Approach*’ (2017), p 7-12.

BIBLIOGRAPHY

Primary Sources

Constitution

Constitution of the Republic of South Africa of 1996.

Statutes

South African:

Basic Conditions of Employment Act 75 of 1997

Employment Equity Act 55 of 1998.

Labour Relations Act 66 of 1995.

Occupational Health and Safety Act 85 of 1993.

Unemployment Insurance Act 63 of 2001.

Foreign:

Employment Rights Act of 1996.

Equality Act of 2010.

The Health and Safety at Work Act of 1974.

Master and Servant Act 15 of 1856.

National Minimum Wage Act of 1998.

Working Times Regulation Act of 1998.

International:

Equal Remuneration 191, (No.100).

Cases

South African:

Affordable Medicines Trust and Others v Minister of Health of RSA and Another (2005) BCLR 529 (CC).

Butie v MEC Gauteng Department of Health (2016) 37 ILJ 1445 (LC).

Colonial Mutual Life Assurance Society Ltd v MacDonald (1931 AD) 412.

Denel (Pty) Ltd v Gerber [2005] 9 BLLR 849 (LAC).

Discovery Health Ltd v Commission for Conciliation, Mediation & Arbitration & others (2008) 29 ILJ 1480 (LC).

Kylie v CCMA [2010] 7 BLLR 705 (LAC).

NEHAWU v UCT [2002] ZACC 27.

NUMSA v Assign Services and Others [2017] ZALAC 44.

S v Makwanyane and Another [1995] ZACC 3.

SABC v CCMA [2017] ZALCJHB 76.

SITA (Pty) Ltd v CCMA (2008) 29 ILJ 2234 (LAC).

Smit v Workman Compensation Commissioner 1979 (1) SA 51 (A).

South African National Defence Unit v Minister of Defence [1999] ZACC 7.

South African National Defence Unit v Minister of Defence 2007 (5) SA 400 (CC).

Uber South Africa Technology Services Pty (Ltd) v NUPSAW & Others (C449/17) [2018] ZALCCT 1.

Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU and Others (2017) In Limine Ruling (CCMA).

Universal Church of The Kingdom of God v Myeni & Others (2015) 36 ILJ 2832 (LAC).

Foreign:

Aslam and ors v Uber BV and ors Case 2202551/2015.

Asociación Profesional Élite Taxi v Uber Systems Spain SL, JUDGMENT OF THE COURT (Grand Chamber), (2017).

Uber BV, Uber London Ltd, Uber Britannia Ltd v Aslam & Others UKEAT/0056/17/DA.

Autoclenz Ltd v Belcher and others [2011] IRLR 820 SC.

Defrenne (No.2) v. Sabena (1976) ECR 455

Devonald v Rosser & Sons [1906] 2 KB 728.

Express & Echo Ltd v Tanton [1999] ICR 693.

Independent Workers' Union of Great Britain v RooFoods Limited T/A Deliveroo TUR1/985(2016).

O'Conner et al v Uber Technologies, Inc., et al (California District Court) Case no. C-13-3826 EMC.

O'Kelly v Trusthouse Forte plc [1983] ICR 728.

Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance [1968] 2 QB 497.

Restaurants Ltd v. Quashie [2012] EWCA Civ. 1735, [2007] UKEAT 296 (I.R.L.R.).

Secondary Sources

Articles, Reports and Papers

A. Aloisi 'Commoditized Workers: Case Study Research on Labor Law Issues Arising from A Set of 'On-Demand/Gig Economy' Platforms' 37 Comp. Lab. L. & Pol'y J. 653, 670 (2016).

B.Burchell 'The_Employment_Status_of_Individuals_in_Non-standard_Employment' (1999).

Berg, J.; De Stefano, V. "It's time to regulate the gig economy", in Sheffield Political Economy Research Institute (SPERI) Blog (18 April), 2017.

Brhmie Balaram, Josie Warden and Fabian Wallace-Stephens 'Good Gigs- A fairer future for the UK's gig economy' (2017).

Court of Justice of the European Union: Press Release No 50/17: Advocate Generals Opinion in Case C-434/15- Asociación Profesional Elite Taxi v Uber Systems Spain, SL.

Craig Bosch; Sarah Christie 'Are sex workers employees' (2007) ILJ.

ES Fourie 'Non-Standard Workers: The South African Context, International Law And Regulation By The European Union' PER/PELJ 2008 (11)4.

Eisenbrey R. and Mishel L. (2016), "Uber Business Model Does Not Justify a New 'Independent Worker' Category."

European Agency for Safety and Health at Work '*A Review of The Future of Work: Online Labour Exchanges, Or Crowdsourcing: Implications For Occupational Safety and Health*' (discussion paper).

Fabian McNeilly '*Sham Self-Employment Contracts: Taking a Liberty?*' Manchester Student Law Review (Vol 2:15).

'Fairness at Work' Research Paper 98/99 (November 1998),

Good Work: The Taylor Review of Modern Working Practices (2017).

Guy Davidov, Mark Freedland & Nicola Kountouris '*The Subjects of Labor law: "Employees" and Other Workers*' (Matthew Finkin & Guy Mundlak Eds., Edward Elgar (2015).

Guy Davidov '*The Status of Uber Drivers: A Purposive Approach*' (2017).

Harry Hutchison '*Subordinate or Independent, Status or Contract, Clarity or Circularity: British Employment Law, American Implications,*' International and Comparative Law Journal Vol 28:55.

Hester Jewitt '*Uber drivers have been ruled to be "workers" not self-employed contractors*' New Law Journal (2016),

House of Commons Work and Pensions and Business, Energy and Industrial Strategy Committees '*A Framework for Modern Employment*' (2017-19).

Jan Theron '*Employment is not what it used to be*' (2003) 24 ILJ

Jan Theron '*Intermediary or Employer? Labour brokers and the Triangular Employment Relationship*' (2005) ILJ.

Jan Theron '*The Shift to Services and Triangular Employment: Implications for Labour Market Reform*' (2008) ILJ.

Jan Theron '*Non-standard employment and labour legislation: The outlines of a strategy,*' (2014) Monograph.

Kgomotso Mokoena '*Are Uber drivers employees? A look at the emerging business models and whether they can be accommodated by South African Labour Law*' (2016) 37 ILJ.

Michael Ford '*The Impact of Brexit on UK Labour Law*' International Journal of Comparative Labour Law 32, no. 4 (2016): 473–496.

Miriam A. Cherry '*Beyond Misclassification: The Digital Transformation of Work*' (2016).

Mimi ZOU '*The Regulatory Challenges of 'Uberization' in China: Classifying Ride Hailing Drivers*' International Journal of Comparative Labour Law and Industrial Relations 33, no 2 (2017): 269-294.

Paul Benjamin '*An Accident of History: (Who is and Who should be) an Employee under South African labour Law*' (2004) ILJ.

Richard A Bales; Christian Patrick Woo '*The Uber Dollar Question: Are Uber Drivers Employees or Contractors*', 68 Mercer L. Rev. 461, 488 (2017).

Rochelle le Roux '*World of work: forms of enlargement in South Africa*' (2009) Monograph Series.

Rochelle le Roux '*The Evolution of the Contract of Employment in South Africa*' (2010) ILJ.

Roxana Radu, Stephanie Borg Psaila '*Uberisation Demystified: Examining Legal and Regulatory Responses Worldwide*' (2017).

S. Deakin '*Interpreting Employment Contracts: Judges, Employers, Workers*' ESRC (Working Paper No. 267).

Seth D. Harris and Alan B. Krueger '*A Proposal for Modernizing Labour Laws for Twenty-First-Century Work: "The Independent Worker"*', Discussion Paper (2015-10).

Statistics South Africa '*Quarterly Labour Force Survey*', Quarter 3 (2017).

Supio '*Transformation of labour and future of labour law in Europe*' final report (1998).

The Commission of the European Communities green paper: '*Modernising Labour Law to Meet the Challenges of the 21st Century*' (2006).

'UK Employment Rights and the EU' TUC.

Valerio De Stefano '*The Rise of the "Just-In-Time Workforce": On-Demand Work, Crowd Work and Labour Protection in the "Gig Economy"*' Comparative Law and Policy Journal, Forthcoming Bocconi Legal Studies Research Paper No. 2682602 (2015).

Valerio de Stefano '*Labour is not a technology-Reasserting the Declaration of Philadelphia in times of Platform Work and Gig-Economy*' IUSLabor 2/2017.

Zoe Adams and Simon Deakin '*Institutional Solutions to Precariousness and Inequality in Labour Markets*' Centre for Business Research, University of Cambridge WP463 (2014).

Recommendations and Regulations

Code of Good Practice: 'Who is an Employee?'

The Code of Good Practice on the Arrangement of Working Time.

Employment Relationship Recommendation, 2006 (No. 198).

Books

Currie I & De Waal J '*The Bill of Rights Handbook*,' 6ed (2013) Juta, Cape Town.

H Cheadle & Dennis Davis '*South African Constitutional Law: The Bill of Rights*' (2005) LexisNexis South Africa.

Du Toit et al '*The Labour Relations Law: A Comprehensive Guide*, 6-ed (2015), LexisNexis, South Africa.

Deakin S & Gillian S Morris '*Labour Law* 6th ed (2012), Hart Publishing, Oregon.

Internet references

'Globalization' <https://en.wikipedia.org/wiki/Globalization>, accessed on 11 February 2018.

<http://whatis.techtarget.com/definition/gig-economy>, accessed 11 February 2018.

<http://www.bbc.com/news/business-38930048>, accessed 11 February 2018.

'Uber' <https://get.uber.com/p/legacy-cl-base/>, accessed 11 February 2018.

‘International Labour Organization’ http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_120470/lang--en/index.htm, accessed 11 February 2018.

‘About the ILO’ <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm>, accessed 11 February 2018.

‘Mission and Impact of the ILO’ <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm>, accessed 11 February 2018.

‘Conventions and Recommendations’
<http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>, accessed 11 February 2018.

‘Declaration of Philadelphia’
https://en.wikipedia.org/wiki/Declaration_of_Philadelphia , accessed 11 February 2018.

‘The benefits of International Labour Standards’
<http://www.ilo.org/global/standards/introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang--en/index.htm>, accessed 11 February 2018.

‘Good Work: the Taylor Review of Modern Working Practices’
<https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices>, accessed 31 January 2018.

‘Deliveroo’ <https://en.wikipedia.org/wiki/Deliveroo>, accessed 31 January 2018.

‘Uber Wars: Clash in the Mother City’
<https://www.dailymaverick.co.za/article/2016-07-15-uber-wars-brutal-attack-on-driver-sparks-mother-city-clash-between-meter-taxi-protesters-and-police/#.Wk6Y2IVOLVI>, accessed 4 January 2018.

<https://www.timeslive.co.za/news/south-africa/2017-08-23-uber-driver-killed-dumped-in-field-near-daveyton/>, accessed 4 January 2018.

‘Being an Uber driver in South Africa can be lethal’
<https://www.cnet.com/news/meet-ubers-private-security-firm-in-south-africa/>, accessed 4 January 2018.

E news, checkpoint, 14th November 2017.